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No. 10-28

In The
Supreme Court of the United States

ANNE CHAE, WILLIAM COAKLEY, HOON KOO and CARLOS PINEDA, Individually and On Behalf of All Others Similarly Situated,

Petitioners,

v.

SLM CORPORATION, SALLIE MAE, INC., SALLIE MAE SERVICING CORPORATION, and UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should review be granted to resolve the conflict between the Ninth and Fourth Circuits as to whether "uniformity" is an objective of the Higher Education Act?

2. If uniformity were an objective of the Higher Education Act, whether Congress intended that it pre-empt enforcement of state contract and consumer protection laws by student loan borrowers, who otherwise have no means of judicial redress.

3. Whether the Ninth Circuit's holding that Petitioners' state-law fraud claim is expressly pre-empted by 20 U.S.C. § 1098g, which exempts federal student loans from state-law disclosure requirements, contravenes this Court's decisions in *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008) and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), for determining the scope of an express pre-emption provision.

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OPINION BELOW

The decision of the Ninth Circuit Court of Appeals is reported at 593 F.3d 936 (2010) and reproduced in the appendix at pages 1-30. The district court did not publish an opinion; its findings of facts and conclusions of law, and order granting summary judgment to Respondents SLM Corporation, Sallie Mae, Inc. and Sallie Mae Servicing Corporation are reproduced in the appendix at pages 33-79, and 80.

JURISDICTION

The Ninth Circuit filed its decision on January 25, 2010, and entered an order denying Petitioners' petition for rehearing and rehearing en banc on April 1, 2010. App. 81. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Reproduced in the appendix are the following constitutional, statutory and regulatory provisions involved in this case:

U.S. Constitution, Article VI, Clause 2

20 U.S.C. § 1082

20 U.S.C. § 1098g

34 C.F.R. § 682.202

34 C.F.R. § 682.205

34 C.F.R. § 682.209

California Business and Professions Code, § 17200

California Civil Code, § 1671

STATEMENT OF THE CASE

Plaintiffs Ann Chae, William Coakley, Hoon Koo and Carlos Pineda are California residents who borrowed money from private lenders to pay for college. The loans are (or were) owned and serviced by Respondents SLM Corporation, Sallie Mae, Inc. and Sallie Mae Servicing Corporation (collectively, "Sallie Mae"). Appendix (App.) 40, 44, 50, 55.

The private lenders made the loans pursuant to the Federal Family Education Loan Program ("FFELP") of the Higher Education Act ("HEA"). 20 U.S.C. §§ 1071-1087-4. The FFELP provided for private lenders to make loans to students attending eligible post-secondary schools and their parents. The loans are guaranteed by state agencies or non-profit

organizations, and reinsured by the federal government.[1] App. 4-5.

Borrowers complete a standardized agreement, consisting of an application, promissory note and statement of the borrower's rights and responsibilities. 20 U.S.C. § 1082(m)(1)-(3); Excerpts of Record (ER) 105, 114, 122. The Secretary of the Department of Education (DOE), "in cooperation with representatives of guaranty agencies, eligible lenders, and organizations involved in student financial assistance," prescribes the "common application forms and promissory notes, or master promissory notes" given to borrowers. 20 U.S.C. § 1082(m)(1)(A), App. 88-89.

The agreement specifies the loan is for a fixed sum of money, to be repaid in monthly installments over the term of the loan. 20 U.S.C. §§ 1078, 1078-2, 1078-3, 1087. The lender or third-party servicer sends a repayment notice to the borrower, with the monthly payment amount, the day of the month the payments

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[1] FFELP loans will become unavailable July 1, 2010. *See* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, Title II, Subtitle A, Part II, Student Loan Reform, sec. 2201 (terminating FFELP appropriations); sec. 2205 (terminating PLUS loans); sec. 2206 (Consolidation Loans), sec. 2207 (terminating Unsubsidized Stafford Loans). The estimated existing $456.2 billion in FFELP loans will continue to be serviced. http://www.finaid.org/loans/ (Last visited June 29, 2010).

Federal student loans will continue to be available through the William D. Ford Federal Direct Loan Program, in which the government lends money to students directly. *See* 20 U.S.C. §§ 1087a-1087j; App. 3, n.1.

are due, the number of payments, and the date payments begin. 34 C.F.R. § 682.205(c); *see* Sealed Excerpts of Record (SER) 55, 63 (repayment notices).

The monthly amount required to repay an installment loan is determined by amortization. The amount is a function of three variables: the principal; the interest rate; and the number of monthly payments. SER 5 (Expert Report of Douglas A. Young). Each payment includes an amount of interest and principal, with the amount allocated to interest decreasing over time and the amount allocated to principal increasing. SER 4-5.

The loan agreements and regulations provide that the first payment will be due within 60 days after the repayment period begins. App. 107-110; 34 C.F.R. §§ 682.209(a)(1), (a)(2)(i) (Consolidation and PLUS loans); § 682.209(a)(3)(ii) (Stafford loans). Sallie Mae schedules borrowers' first payment due date "as close as possible to 60 days from the repayment begin date without going over 60 days," and it is never less than 55 days. Clerk's Docket No. (Dkt.) 148-2, pp. 16-17.

Sallie Mae uses a proprietary amortization formula to calculate a borrower's monthly installment payment. SER 14. The formula adds the daily interest that will accrue between the 30th day of the repayment period and the first scheduled payment date to the outstanding principal. That increased amount is then amortized over the total number of payments at the specified interest rate, producing the

borrower's monthly installment payment. SER 14. The repayment notice reflects only the outstanding principal, and not the increased amount used to calculate the borrower's payment. SER 55, 63. Sallie Mae does not adjust the monthly payment amount if it receives borrower's first payment before the scheduled due date.

Sallie Mae's proprietary formula effectively causes the borrower unknowingly to take out a loan equal to 25 to 30 days of interest, which is included in the borrower's monthly payment and re-paid over the term of the loan. This practice violates the FFELP regulations, as it capitalizes interest before it accrues. App. 96-98; 34 C.F.R. § 682.202(b) (when interest may be capitalized).

The FFELP and corresponding regulations permit but do not require a late fee to be assessed when a borrower's payment is not received within a specified number of days of the scheduled due date. App. 98; 34 C.F.R. § 682.202(f). The fee may not be more than six percent of the late payment. App. 98; 34 C.F.R. § 682.202(f)(1). Sallie Mae assesses late fees, calculated as six percent of the amount not received. App. 38.

Sallie Mae charges interest daily on the outstanding principal (*i.e.*, interest accrues daily and is calculated as a percentage of the outstanding principal). *See* App. 36. This means Sallie Mae continues to earn daily interest on the portion of a payment that represents principal until the payment is actually

received. Because Sallie Mae charges daily interest, and assesses a late fee that is calculated as a percentage of the amount of payment not received, the borrower pays Sallie Mae twice for the use of the same funds. Sallie Mae charges late fees not to cover the cost it incurs from a late payment, but to deter borrowers from paying late. Dkt. 151, Exhibit 29.

The DOE's Direct Loan Program also charges daily interest. App. 39. The Direct Loan Program, however, does not charge late fees. ER 86A-86B.

Petitioners filed suit in April, 2007, on behalf of themselves and a putative class of similarly situated borrowers. Jurisdiction in the district court was based on 28 U.S.C. § 1332(d), vesting original jurisdiction of class actions involving citizens of different states in which the amount in controversy exceeds $5,000,000. Petitioners challenged three servicing practices, but limit their challenge here to only two:

> 1) Sallie Mae's practice of exploiting the 60 day first period, which it does by capitalizing interest before it accrues, and calculating a borrower's monthly payment based on that increased amount, which exceeds the outstanding principal. This practice, which violates the FFELP regulation on capitalizing interest, is a breach of the contractual covenant of good faith and fair dealing, as it results in payment schedules that require excess interest. It is also a fraudulent practice that violates California's

Unfair Competition Law ("UCL"), Business and Professions Code § 17200, *et seq.*; and

(2) Sallie Mae's practice of assessing non-compensatory late fees, in violation of California Civil Code § 1671, which prohibits unreasonable liquidated damage provisions, and constitutes an unlawful practice under the UCL.[2]

The DOE, appearing as the United States, filed a complaint in intervention for declaratory relief. Dkt. 121, 224. Sallie Mae moved for summary judgment on grounds that the claims were pre-empted by federal law and on the merits. Dkt. 153-159. The DOE moved for summary judgment, seeking a declaratory ruling that federal law pre-empts California state law that would mandate different practices from those required or authorized by federal law. Dkt. 140-143, 204. Petitioners moved for partial summary judgment. Dkt. 148-152.

The district court orally granted Sallie Mae's motion for summary judgment on grounds that the HEA pre-empted Petitioners' state statutory and common law claims; the court subsequently granted Sallie Mae summary judgment on the merits as well, by signing its proposed findings of fact and conclusions of law. App. 33-79. The district court declared

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[2] Petitioners previously, but no longer, challenge Sallie Mae's practice of charging daily interest between receipt of payments, rather than by installment period, as a breach of the loan agreement.

the DOE's and Petitioners' summary judgment motions moot, and entered final judgment for Sallie Mae. App. 31.

The court of appeals affirmed the district court's grant of summary judgment on grounds of pre-emption. The court ruled that Congress's objectives in enacting the FFELP included "uniformity" in its operation, and that Congress therefore intended to pre-empt Petitioners' contract and UCL late fee claims because they would pose an obstacle to achieving uniformity. App. 17-23, 24-25. The court ruled Petitioners' UCL fraud claim was expressly pre-empted by 20 U.S.C. § 1098g, which exempts HEA loans from "any disclosure requirements of any State law." App. 11-15, 92.

REASONS FOR GRANTING THE PETITION

I. Review Should Be Granted To Resolve The Conflict Between The Ninth And Fourth Circuits As To Whether Uniformity Is An Objective Of The Higher Education Act, And Even If It Were, Whether Congress Intended It To Pre-Empt State Contract And Consumer Protection Law

The Supremacy Clause vests authority in Congress to pre-empt state law. *Altria Group, Inc. v. Good*, ___ U.S. ___, 129 S. Ct. 538, 543, 172 L. Ed. 2d 398 (2008), *citing* U.S. Const., art. VI, cl. 2. App. 96. This Court "traditionally distinguishes between

'express' and 'implied' pre-emptive intent." *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 884, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000).

Express pre-emption occurs when Congress's intent is "explicitly stated in the statute's language. . . ." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (internal quotation omitted). Implied pre-emption may be found "where the scope of the statute indicates that Congress intended federal law to occupy the legislative field" (field pre-emption), "or if there is an actual conflict between state and federal law" (conflict pre-emption). *Altria Group, Inc.*, 129 S. Ct. at 543 (citation omitted). Implied conflict pre-emption may be found only in two circumstances: where compliance with both state and federal law would be impossible, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000), *quoting Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 2d 581 (1941).

The "two cornerstones of . . . pre-emption jurisprudence" are, "[f]irst, 'the purpose of Congress is the ultimate touchstone in every pre-emption case,'" and "[s]econd, '[i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . [the inquiry] start[s] with the assumption that the historic police powers of the States were not to be

superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 555 U.S. ___, 129 S. Ct. 1187, 1194-95, 173 L. Ed. 2d 51 (2009), *quoting Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (internal quotations omitted).

These cornerstones are supplemented by a number of interpretive guides, two of which apply here. First, "the presumption against pre-emption is even stronger against pre-emption of state remedies . . . when no federal remedy exists." *College Loan Corp. v. SLM Corporation*, 396 F.3d 588, 597 (4th Cir. 2005) (internal quotations omitted), *citing Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984). Second, Congress's express pre-emption of specific areas of state law encompassed by a federal statute, "implies that matters beyond that reach are not pre-empted." *Cipollone*, 505 U.S. at 517, 112 S. Ct. 2608 ("When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' . . . 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation."), *quoting Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S. Ct. 1185, 55 L. Ed. 2d 443 (1978), and *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987) (opinion of Marshall, J.).

These considerations all favor the conclusion that Congress did not intend the HEA to pre-empt Petitioners' state contract or late fee claims. The assumption against pre-emption applies with particular force to Petitioners' claims because, as the court of appeals acknowledged, "[c]ontract and consumer protection laws have traditionally been in state law enforcement hands." App. 16, *citing, inter alia*, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963); *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1125 (11th Cir. 2005).

That assumption is also strengthened here because the HEA does not provide for a private cause of action, leaving student loan borrowers with no means of judicial redress other than state law. *See McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1221 (11th Cir. 2002) (HEA does not provide an express or implied private right of action, and citing cases to same effect).

Further, Congress has expressly pre-empted numerous specific areas of state law from the operation of the HEA loan program, and "these express provisions [of the HEA] for pre-emption of some state laws imply that Congress intentionally did not pre-empt state law generally, or in respects other than those it addressed."[3] *Keams v. Temple Technical*

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[3] *See* 20 U.S.C. §§ 1078(d) (state usury laws); 1091a(a)(2) (state statutes of limitations); 1091a(b)(1)-(3) (state laws on

(Continued on following page)

Institute, 39 F.3d 222, 225 (9th Cir. 1994). Especially significant for present purposes is Congress's decision to expressly pre-empt specific and narrow areas of state contract law, and not otherwise. *See* 20 U.S.C. § 1091a(b)(2)-(3) (state infancy defenses to contract liability).

These guides, of course, are not determinative, nor do they end the inquiry. They do, however, suggest Congress did not intend to pre-empt state contract and consumer protection laws, and the opposite conclusion should not be reached absent a showing that it "was the clear and manifest purpose of Congress." *Wyeth*, 129 S. Ct. at 1194-95 (internal quotations omitted).

The Ninth Circuit's decision instead rests on the most-attenuated type of pre-emption – "obstacle" pre-emption, also referred to as "purposes and objectives" pre-emption. App. 19-29; *see Wyeth v. Levine*, 129 S. Ct. at 1211-17 (Thomas, J., concurring in the judgment). This type of pre-emption is based on the notion that where Congress passes a law to accomplish a particular purpose or objective, and state law poses an obstacle to its achievement, a court may infer that Congress implicitly intended to pre-empt it. *See, e.g.*, *Crosby*, 530 U.S. at 373, 120 S. Ct. 2288; *Hines*, 312 U.S. at 67, 61 S. Ct. 399.

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collection costs; state infancy defenses to contract liability); 1095a(a)(1) (state wage garnishment limitations); 1098g (state disclosure requirements).

The Ninth Circuit discerned that an objective of Congress in enacting the HEA's FFEL Program was "uniformity," which it referred to variously as "uniform standards," "uniformity of FFELP regulations," "[r]egulatory uniformity," or simply "uniformity." *See, e.g.*, App. 17-18, 20-21. Its source for concluding uniformity was one of Congress's objectives was "the FFELP as a whole." App. 17. The court explained that, "[a]fter reviewing the FFELP as a whole, we agree with the DOE that Congress intended it to operate uniformly." App. 17. The evidence of this intended objective to which the court points is "the comprehensive framework" that Congress established to govern the program. This framework includes provisions setting the allowable interest rates, borrowing limits and length of the loans, and provisions authorizing and directing the DOE to prescribe regulations establishing "minimum standards," for lenders, and standardized forms. App. 17, *citing, inter alia*, 20 U.S.C. §§ 1078, 1078-2, 1078-3, 1077a.

Having agreed with the DOE on this objective, the court then deferred to the DOE's assertion that Petitioners' state contract and late fee claims would pose an obstacle to uniformity, and declares state law pre-empted. App. 23-25.

Congress identified the objectives of the FFEL Program, and uniformity was not among them. 20 U.S.C. § 1071(a)(1) (purposes of the FFELP). The Fourth Circuit made this point in rejecting an earlier attempt by Sallie Mae to use pre-emption as a defense to a breach of contract based on an objective of

uniformity. *See College Loan Corp. v. SLM Corp.*, 396 F.3d at 597. The Fourth Circuit rejected the contention, explaining that "we are unable to confirm that the creation of 'uniformity,' . . . was actually an important goal of the HEA."). *Id.* at 597 ("The purposes of the FFELP are spelled out in § 1071(a)(1) of the HEA: they include encouraging states and nonprofit organizations to make loans to students for post-secondary education, providing loans to those students who might not otherwise have access to funds, paying a portion of the interest accruing on student loans, and guaranteeing lenders against losses."); *see also Cliff*, 363 F.3d at 1127-30 (FFELP goals do not support implied pre-emption of Florida debt collection act).

The Ninth Circuit's justification for its contrary ruling – the comprehensive framework of the FFELP – does not overcome the Fourth Circuit's straightforward reasoning.[4]

First, the FFELP regulations, while extensive and detailed in some respects, are not truly comprehensive. They leave important parts of the loan

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[4] The Ninth Circuit's suggestion that "even if within the Fourth Circuit, [it] would not apply *College Loan*," cannot be squared with the law of pre-emption. App. 20. It is true that in *College Loan* the claimed breach involved "a contractual relationship between lenders," and the breach here involves a contractual relationship between a lender and borrowers, but that does not affect the Fourth Circuit's ruling that uniformity is not an objective of the FFELP.

process unregulated. They do not, for example, specify or regulate how interest is to be charged, and they leave the content of billing statements entirely up to the lender. App. 21, 25.

Second, "the mere existence of a federal regulatory scheme," even a particularly detailed one, "does not by itself imply pre-emption of state remedies." *English v. General Elec. Co.*, 496 U.S. 72, 87, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990) (employee's state law claim for intentional infliction of emotional distress not pre-empted by Energy Reorganization Act); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 717, 719, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985) (to conclude otherwise would be "virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive."). The only basis for the court's ruling here is the regulatory scheme.

Third, if the regulations were sufficiently comprehensive to establish that uniformity was an objective intended to pre-empt state law, field pre-emption would apply. The court's ruling is undermined by its acknowledgment that Congress's legislation in the area is not so extensive as to support a finding of field pre-emption. App. 11 (recognizing that "field pre-emption is off the table"), *citing, inter alia*, *Keams*, 39 F.3d at 225-26 ("It is apparent . . . that Congress expected state law to operate in much of the field in which it was legislating."). Respondents' uniformity argument is actually a field pre-emption argument that is factually deficient and foreclosed by precedent,

presented under the guise of purposes and objectives pre-emption. *See College Loan Corp.*, 396 F.3d at 596, n.6 (noting that district court's pre-emption ruling based on uniformity was akin to field pre-emption).

The court's ruling is also undermined by its implicit acknowledgment that Sallie Mae does not have a plausible impossibility pre-emption claim – *i.e.*, it is not impossible for Sallie Mae to comply with both federal and state law. If Sallie Mae can comply with both state and federal law, state law cannot truly be an obstacle to uniformity of federal law.

Fourth, uniformity is not an objective, but a means to an end. *See, e.g., Altria Group, Inc.*, 129 S. Ct. at 544 (Cigarette Labeling Act's purpose in pre-empting state laws that would require non-uniform warnings is not for labels to be uniform but to prevent individual state warnings from impeding commerce in cigarettes). To rely on uniformity to pre-empt state law for the sake of uniformity is to pre-empt state law to achieve an objective that serves no purpose.

The court of appeals speculates that uniformity serves the HEA's purpose of making loans available to student borrowers, based on the hypothesis that lenders would be less willing to make loans, or more costly to the government to gain their participation, if lenders were subject to state law. App. 18-19, 20. Notably, neither the DOE or Sallie Mae advanced this proposition, and neither presented any argument or evidence to support it. In instances where state law has posed an obstacle to the program, the DOE has

issued specific regulations pre-empting state law, supported by appropriate authorization from Congress. *See, e.g., Brannan v. United Student Aid Funds Inc.*, 94 F.3d 1260 (9th Cir. 1996).

In *Brannan*, the court afforded pre-emptive effect to HEA administrative regulations where: (1) Congress had "explicitly authorized the Secretary to 'prescribe such regulations as may be necessary' to establish a uniform national standard for debt collection activity"; and (2) "[c]onsistent with the congressional charge, the Secretary ha[d] issued a regulatory framework for pre-litigation loan collection"; and (3) the Secretary had issued an "official interpretation stating that regulations issued under 20 U.S.C. § 1082(a) pre-empt inconsistent state law governing pre-litigation collection activities by third-party debt collectors"; and (4) in that published official interpretation, "explained why recognizing liability under inconsistent state law 'would thwart the congressional intention implemented in [the FFELP] regulations.'" *Brannan*, 94 F.3d at 1263, 1265 (internal citations omitted).[5]

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[5] Even with these limitations, the Eleventh Circuit declined to follow *Brannan* and ruled that the Secretary's assertion of pre-emptive authority did not pre-empt state law. *See Cliff*, 363 F.3d at 1129, n.12 ("Our conclusion differs from that of the *Brannan* majority for several reasons. First, as we note later in our discussion, the *Brannan* majority failed to analyze conflict preemption on a provision-by-provision basis, opting instead to adopt a broad view of conflict preemption."). *See College Loan Corp.*, 396 F.3d at 597, n.7 (finding *Brannan* "is distinguishable"

(Continued on following page)

The court's speculation as to the burden and consequence that the prospect of state law enforcement would have on lenders is also not borne out by the available evidence. Sallie Mae's "Customer Requirements Manual" and loan documents already reflect the need for compliance with different state laws on late fees. *See, e.g.*, Dkt. 193 (Exhibits H-J); Dkt. 193-10 (Exhibit K) (Deposition Excerpts of Carole Bowman). Sallie Mae's computerized systems account for different late fee requirements depending on the loan origination documents. *See id.*

None of this means Congress did not desire the FFEL Program to operate uniformly. However, Congress's desire that a program operate uniformly in certain respects does not mean it considered lock-step uniformity to be an objective of sufficient importance to pre-empt state law that posed an obstacle to its achievement.

Proof that Congress did not intend to pre-empt state law, beyond the narrow areas it pre-empted expressly, is provided by Congress's explicit command that FFELP loan contracts "*shall be . . . enforceable in all Federal and State courts.*" App. 90; 20 U.S.C. § 1082(m)(1)(D)(iii) (emphasis added); *see Tipton v. Sec'y of Educ. of U.S.*, 768 F. Supp. 540, 553 (S.D.

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because "[t]here, the court deferred to a Notice of Interpretation issued by the Secretary, opining that any state law conflicting with the collection procedures established by the Act is preempted. No such interpretation is present here.").

W.Va. 1991) (the "seminal requirement" of the FFELP is "that the loan agreement be an 'enforceable obligation under applicable law.'"). The Ninth Circuit's ruling cannot be correct, as it renders the loan agreement *not* "enforceable in all Federal and State courts," which is the exact opposite of what Congress directed and intended.

Congress's explicit command that the contrast be enforceable in all state courts undermines the court's ruling not only as to Petitioners' contract claim, but their late fee claim as well. In both instances, the court's ruling rested on the premise that Congress sought uniformity and intended to pre-empt state law that posed an obstacle to its achievement. If that were true, Congress would not have explicitly authorized state court actions. Section 1082(m)(1)(D)(iii) thus demonstrates that uniformity was not an objective of the FFELP, and leaves the court's ruling pre-empting Petitioners' late fee claim without support.

Further, even if uniformity was in some sense an objective of the HEA, it would not support pre-emption of Petitioners' contract and late fee claims because neither is an obstacle to uniformity. Petitioners' claim that Sallie Mae breaches the covenant of good faith and fair dealing by its practice of exploiting the 60 day first period does not seek to invalidate the regulation allowing the first payment date to be set within 60 days. Petitioners seek to enforce the regulation that Sallie Mae violates in exploiting the 60 day first period, 34 C.F.R. § 682.209(b), which prohibits capitalizing interest

before it accrues. App. 99-101. Sallie Mae can still set the first payment to be due on the 60th day, but it may not capitalize interest from that 60 days before it has accrued.

Petitioners' late fee claim also does not pose an obstacle to uniformity. Petitioners do not contend "that California law prohibits the imposition of a late fee when daily simple interest is used." App. 24. Petitioners only maintain that the fee must be calculated in a manner that compensates Sallie Mae for the cost of a late payment. Further, Petitioners' late fee claim does not pose an obstacle to uniformity because the late fee regulation leaves the decision whether to charge late fees up to the lender. Respondents' uniformity pre-emption argument is an attempt to "seek[ ] out conflicts between state and federal regulation where none clearly exist[s]." *English v. General Elec. Co.*, 496 U.S. at 90, *quoting Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960).

Finally, to the extent that non-uniform contract laws are a legitimate concern, they can be fully addressed by applying federal common law of contracts, instead of allowing Sallie Mae "to enter into a contract . . . then to proceed to breach its duties thereunder and to shield its breach by pleading pre-emption." *College Loan Corp.*, 396 F.3d at 598 (citation omitted).

In sum, the court of appeals decision is an example of state law being given short shrift by

uncritically deferring to agency-based "purposes and objectives" pre-emption. Congress did not authorize the DOE to pre-empt the state law at issue here, there is no regulation that purports to do so, and the DOE's "mere assertion that state law is an obstacle to achieving its statutory objectives" falls far short of what the Constitution requires. *Wyeth*, 129 S. Ct. at 1201; *compare Brannan,* 94 F.3d at 1263-65 (explicit Congressional authorization, and an official interpretation by the Secretary stating regulations issued pre-empt inconsistent state law).

Review should be granted first of all to resolve the conflict between the Ninth and Fourth Circuits as to whether uniformity is an objective of the FFELP. That conflict remains an important one to resolve even though FFELP loans are no longer available for two reasons. First, the availability of state law enforcement in the servicing of the existing $456.2 billion in FFELP loans should not vary depending upon the circuit where a borrower happens to live. Second, the conflict between the Ninth and Fourth Circuits as to the purpose of the HEA is not narrowly constrained to FFELP loans, but applies also to the now monolithic Direct Loan Program. Further, review is warranted to establish that purposes and objectives pre-emption, to the extent it is available at all, is limited to those purposes and objectives that Congress itself has made clear it deemed sufficiently important to pre-empt state law.

II. Review Should Be Granted To Determine Whether Congress Expressly Pre-Empted Petitioners' State-Law Fraud Claim By Exempting Federal Student Loans From State-Law Disclosure Requirements

Congress expressly pre-empted federal student loans from "any disclosure requirements of any State law." 20 U.S.C. § 1098g.[6] An express provision pre-empts a state law claim where "the substance and scope of Congress's [intended] displacement of state law," encompasses the "legal duty that is the predicate of" the state law claim. *Altria Group, Inc.*, 129 S. Ct. at 543 (The existence of an express pre-emption provision "does not immediately end the inquiry because the question of the substance and scope of Congress's displacement of state law still remains."), *id.* at 545, *citing Cipollone,* 505 U.S. at 524, 112 S. Ct. 2608 (plurality opinion). The presumption against pre-emption supports a narrow interpretation of an express pre-emption provision. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996).

Section 1098g has a limited pre-emptive domain. It was enacted as a Senate amendment to a bill

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[6] Section 1098g, "Exemption from state disclosure requirements," states: "Loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act of 1965 (20 U.S.C. §§ 1070 et seq.) shall not be subject to any disclosure requirements of any State law."

amending the Truth In Lending Act ("TILA") to exempt FFELP loans from TILA's requirement that specific items be disclosed in certain credit transactions.[7] The Senate Report accompanying the amendments explained that the purpose was to avoid unnecessary duplicative disclosures already required by the FFELP itself.[8] *See* App. 102; 34 C.F.R. § 682.205, "Disclosure requirements for lenders."

Petitioners' UCL fraud claim, as stated above, contends that Sallie Mae exploits the 60 day first period by using a proprietary amortization formula that capitalizes interest before it accrues, resulting in borrowers paying unnecessary interest. The predicate

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[7] Pub. L. No. 97-320, Title VII, Miscellaneous Amendment to the Truth In Lending Act, § 701(b), Oct. 15, 1982, 96 Stat. 1538 ("Title VII contains an amendment which exempts loan programs authorized under Part B or E of the Higher Education Act of 1965, as amended, from the revised Truth In Lending regulations . . . "), *see* 1982 U.S. Code Cong. and Adm. News, p. 3054; S. Conf. Rep. 97-641 ("The Senate amendment exempts from the Truth In Lending Act and from disclosure requirements of any state law loans that are made, insured or guaranteed under any program authorized by Title IV of the Higher Education Act of 1965.")

[8] S. Conf. Rep. 97-536, Pub. L. No. 97-320 ("[A]ll disclosures required under the Truth In Lending Act are currently being provided to students receiving loans under Part B or E of the Higher Education Act of 1965, as amended. Therefore, the Committee believes that the exemption from Truth In Lending provisions for these students loans will help to eliminate duplicative paperwork for students, post-secondary educational institutions, state guarantee agencies and lenders while still providing all disclosures and protections to students that are currently required under the act.")

legal duty underlying Petitioners' claim is the general duty not to deceive, and not any state law duty requiring disclosure of information that the FFELP already requires to be disclosed. *See Altria Group, Inc.*, 129 S. Ct. at 545; *Cipollone*, 505 U.S. at 528-29 (fraud claim alleging misrepresentation and concealment not pre-empted because it is based on general state-law obligation, "the duty not to deceive").

A generally applicable state law that proscribes consumer fraud does not create an additional warning or disclosure requirement, but supports the state's right to deter fraud. *Altria Group, Inc.*, 129 S. Ct. at 543-52 (rejecting claims that the Federal Cigarette Labeling Act expressly and/or implicitly pre-empted Maine's consumer fraud statute). Petitioners' UCL fraud claim does not contend that Sallie Mae's proprietary amortization formula should be disclosed, but that its practice of capitalizing interest before it accrues violates FFELP regulations and constitutes fraud.[9] *See* 34 C.F.R. § 682.202(b)(2).

This straightforward analysis and conclusion explains why the DOE acknowledged in the district court that Petitioners' claims are *not* subject to express pre-emption. Dkt. 141, p. 8, n.4 ("The United

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[9] The court of appeals incorrectly construed this claim as contending that Sallie Mae impermissibly sets the first payment date as close as possible to 60 days after interest begins to accrue. App. 24-25. Petitioners do not contend that a 60 day first period is fraudulent or otherwise prohibited by California law. *See* Petitioners' Opening Brief On Appeal, p. 24, n.7.

States does not assert that the three practices at issue, rooted in the daily simple interest method challenged by Plaintiffs, is the subject of a federal statute or regulation that expressly pre-empts California state law."). Sallie Mae made the same concession; it noted in its proposed findings of fact and conclusions of law that to the extent any of Petitioners' claims rested on a duty of disclosure they would be pre-empted by section 1098g, but did not propose or request the district court to rule that any of Petitioners' claims were expressly pre-empted. App. 70, 76-78.

The DOE and Sallie Mae changed their position on appeal, arguing that Petitioners' challenge to the simple daily interest method of calculating interest was expressly pre-empted (the claim Petitioners no longer advance). *See* Answering Brief of the United States of America, pp. 10-12; Answering Brief of Defendants-Appellees, pp. 43-47. Neither the DOE nor Sallie Mae maintained that Petitioners' claims were expressly pre-empted except to the extent they challenged the simple daily interest method of calculating interest.

The court of appeals, however, ruled that section 1098g expressly pre-empted Petitioners' UCL fraud claim. The court's ruling fails to consider section 1098g's intended pre-emptive domain, and misconstrues the general legal duty on which Petitioners' UCL claim is based:

> At bottom, the plaintiffs' misrepresentation claims are improper-disclosure claims. The plaintiffs do not contend that California law prevents Sallie Mae from employing any of the three loan-servicing practices at issue. We consider these allegations in substance to be a challenge to the allegedly-misleading method Sallie Mae used to communicate with the plaintiffs about its practices. In this context, the state-law prohibition on misrepresenting a business practice "is merely the converse" of a state-law requirement that alternate disclosures be made. *See Cipollone*, 505 U.S. at 527.

App. 13.

If the court of appeals analysis were correct, section 1098g would pre-empt all state fraud laws because prohibiting fraud could always be deemed "the converse" of requiring alternate disclosures, *i.e.*, the truth. Such a result cannot be reconciled with Congress's actual intent as evidenced by section 1098g's legislative history.

Because the HEA does not provide a private cause of action, the court's ruling leaves student borrowers who are victims of fraud without any means of judicial recourse. The result is also at odds with this Court's repeated recognition that "it is, to say the least, 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.'" *Medtronic, Inc.*, 518 U.S. at 487, *quoting Silkwood*,

464 U.S. at 251; *Cliff*, 363 F.3d at 1129 (state fraud and misrepresentation claims not pre-empted by HEA regulations governing debt collection because "[w]e are certain that the HEA and its regulations do not contemplate third-party debt collectors attempting to collect debts" through fraud and misrepresentations); *College Loan*, 396 F.3d at 597 ("presumption against pre-emption is even stronger against pre-emption of state remedies . . . when [as here] no federal remedy exists.") (citations omitted).

Review of the court of appeals express pre-emption ruling is warranted because it contravenes the method for determining the scope and application of an express pre-emption provision required by *Altria Group, Inc.* and *Cipollone*. Review is also warranted because the ruling leaves existing FFELP borrowers with no judicial protection against lender fraud.

CONCLUSION

The Court should grant review, reverse the Ninth Circuit's decision, rule that Petitioners' claims are not pre-empted and remand for further proceedings.

Respectfully submitted,

Dated: June 30, 2010 WILLIAM J. GENEGO

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANN CHAE, Individually and On Behalf of All Others Similarly Situated; WILLIAM COAKLEY, Individually and On Behalf of All Others Similarly Situated; HOON KOO, Individually and On Behalf of All Others Similarly Situated; CARLOS A. PINEDA, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs-Appellants,

v.

SLM CORPORATION, DBA Sallie Mae; SALLIE MAE SERVICING CORPORATION; SALLIE MAE, INC.,

Defendants-Appellees,

and

UNITED STATES OF AMERICA,

Plaintiff-intervenor-Appellee.

No. 08-56154

D.C. No. 2:07-cv-02319-R-RC

OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted
November 5, 2009 – Pasadena, California

Filed January 25, 2010

Before: Ronald M. Gould and Carlos T. Bea, Circuit Judges, and William T. Hart,* District Judge.

Opinion by Judge Gould

COUNSEL

William J. Genego (argued), Nasatir, Hirsch, Podberesky & Genego, Santa Monica, California; Michael D. Braun, Braun Law Group, P.C., Los Angeles, California; Andrew Friedman and Victoria Nugent, Cohen, Milstein, Sellers & Toll, Washington, D.C., for the plaintiffs-appellants.

S. Dawn Scaniffe, Mark B. Stern and Sydney Foster (argued), Department of Justice, Washington, D.C., for the plaintiff-intervenor-appellee.

Julia B. Strickland (argued), Lisa M. Simonetti, and David W. Moon, Stroock & Stroock & Lavan LLP, Los Angeles, California, for the defendants-appellees.

OPINION

GOULD, Circuit Judge:

Appellants urge error in the district court's grant of summary judgment rejecting student borrowers' claims that challenge loan servicer methods of calculating interest, assessing late fees and setting the repayment start date on their loans. We must

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* The Honorable William T. Hart, Senior District Judge for the Northern District of Illinois, sitting by designation.

determine the preemptive scope of the statutes and regulations governing lenders and third-party loan servicers under the Federal Family Education Loan Program of the Higher Education Act. We conclude that the student borrowers' claims are preempted by this federal law and we affirm the district court's grant of summary judgment on that ground.

I

The Higher Education Act (HEA) of 1965, now codified at 20 U.S.C. §§ 1001-1155, was passed "to keep the college door open to all students of ability, regardless of socioeconomic background." *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1030 (9th Cir. 2009) (internal quotation marks omitted). As part of that effort, Congress established the Federal Family Education Loan Program (FFELP), a system of loan guarantees meant to encourage lenders to loan money to students and their parents on favorable terms.[1] *See* 20 U.S.C. §§ 1071-1087-4; *Rowe*, 559 F.3d at 1030. The Secretary of the Department of Education (DOE) is authorized to "prescribe such

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[1] The FFELP governs loans made to students by private lenders. It was formerly named the "Guaranteed Student Loan Program" before being renamed in 1992. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 411(a)(1), 106 Stat. 448, 510 (1992). The government operates a parallel program through which it lends money to students directly, called the William D. Ford Federal Direct Loan Program. *See* 20 U.S.C. §§ 1087a-1087j.

regulations as may be necessary to carry out the purposes" of the FFELP. 20 U.S.C. § 1082(a)(1). Under that authority, the DOE has promulgated detailed regulations. *See* 34 C.F.R. §§ 682.100-682.800. We preliminarily review how the FFELP operates, and thereafter explain the procedural history of this case.

A

The FFELP regulates a series of transactions related to student loans. The first layer of transactions occurs between lenders and student or parent borrowers. Eligible banks, credit unions, schools, government agencies, non-profits, and others may make loans to students. 34 C.F.R. § 682.101(a). The lenders must abide by the terms of the FFELP, and the DOE may terminate the participation of any lender who does not follow the rules. 34 C.F.R. §§ 682.700-713. Lenders may assign their loans to third-party loan servicers, in which case the loan servicer must also abide by the FFELP regulations. *See* 20 U.S.C. § 1082(a)(1); 34 C.F.R. §§ 682.203, 682.700(a).

A second layer of FFELP transactions involves "guaranty agencies" that guarantee the lenders' loans. A guaranty agency is a "State or private nonprofit organization that has an agreement with the Secretary under which it will administer a loan guarantee program under the Act." 34 C.F.R. § 682.200(b); *see also* 34 C.F.R. § 682.400 (requiring that a guarantee agency enter into four specific agreements with the

DOE before it may participate in the FFELP). When a borrower defaults on his or her student loan and the lender is unable to recover the amount despite due diligence, the lender recoups its loss from the guarantor. 34 C.F.R. § 682.102(e)(7) ("If a borrower defaults on a loan, the guarantor reimburses the lender for the amount of its loss. The guarantor then collects the amount owed from the borrower.").

A third level of FFELP transactions takes place between the guaranty agencies and the DOE. Guaranty agencies must enter agreements with the DOE in order to participate in the FFELP. 20 U.S.C. § 1078(c). After an agreement is entered, the DOE acts as a secondary insurer on the loans guaranteed by the agency. 20 U.S.C. §§ 1071(a)(1)(D), 1078(c). When a lender assigns its guaranty agency a defaulted loan, the guaranty agency must take diligent steps to recover the default amount, but, having done so, may then recover up to one hundred percent of its losses from the DOE if it is unable to collect the debt. 34 C.F.R. §§ 682.404(a), 682.410(b)(6).

The FFELP governs four types of loans. Three of these are at issue in this appeal.[2] First, Stafford Loans are made to students, 20 U.S.C. §§ 1071(c), 1078, 1078-8, and may be either subsidized or unsubsidized.

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[2] Also regulated by the FFELP, but not at issue on this appeal, are PLUS Loans made to the parents of college students. *See* 20 U.S.C. § 1078-2. All plaintiffs here were student borrowers; none had PLUS Loans.

For subsidized Stafford Loans, the government pays interest on the loan during specified periods, such as when the student borrower is attending school on at least a part-time basis. 20 U.S.C. § 1078(a)-(b). For unsubsidized Stafford Loans, the student is responsible for all accrued interest from the time the loan is disbursed and the government pays none of it. 20 U.S.C. § 1078-8(e)(3). The second type of loan here involved is a Consolidation Loan, which allows the borrower to consolidate multiple loan obligations with one lender. *See* 20 U.S.C. § 1078-3(a). The third type of loan falls under the Supplemental Loans to Students Program, which applied to periods of student enrollment beginning before July 1, 1994, and has since been discontinued. 34 C.F.R. § 682.100(a)(2).

Congress directs the DOE to issue common application forms and promissory notes to be used by FFELP participants. 20 U.S.C. §§ 1082(m)(1)-(4). These common forms include a free application form, master promissory note, and common loan deferment form. *Id.* The purpose of the common forms is to standardize the terms and formatting to help applicants understand their loan obligations. *Id.* § 1082(m)(1)(B).

B

The plaintiffs in this diversity action – Ann Chae, William Coakley, Hoon Koo, and Carlos A. Pineda – took out Stafford, Supplemental, and Consolidated Loans from various lenders between 1993 and 2006. Sallie Mae, Inc. (Sallie Mae) was the loan servicer for

each of the plaintiffs' loans.[1] In its capacity as a third-party servicer, Sallie Mae performed administrative and servicing functions related to the loans, such as issuing billing statements, collecting and processing payments, assessing and collecting late fees, and giving notices to borrowers required by FFELP regulations.

The plaintiffs sued Sallie Mae, on behalf of a purported class of similarly-situated borrowers, complaining about three practices Sallie Mae uses in servicing student loans. First, the plaintiffs challenge Sallie Mae's use of the "daily simple interest" or "simple daily interest" method of calculating interest. This calculation method applies a borrower's payment on the date the payment is received, not the date the payment is due, such that interest accrues based on the number of days since the last payment. This means that borrowers who make payments before the due date pay less overall interest, while borrowers who make payments after the due date pay more overall interest. The plaintiffs claim that the terms of the loan agreements prevent Sallie Mae from using the daily simple method of calculating interest. Instead, the plaintiffs allege that their loan contracts require Sallie Mae to use the "installment method."

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[1] Sallie Mae argues that the other defendants – SLM Corporation and Sallie Mae Servicing Corporation – are not proper parties. In light of our holding that all the defendants were entitled to summary judgment, we need not and do not reach this argument.

Under the installment method, the total amount of interest is fixed and does not vary depending on the date when payment is remitted. The plaintiffs in their complaint asserted that Sallie Mae's failure to use the installment method conflicts with the FFELP statutes and regulations, offends the terms of the loan documents and otherwise violates California law.

Second, the plaintiffs challenge Sallie Mae's practice of assessing late fees. When permitted by the borrower's promissory note, Sallie Mae charges a late fee of up to six percent of each installment remitted more than fifteen days after it is due. The plaintiffs allege that California law prohibits Sallie Mae from charging late fees, at least where Sallie Mae also charges daily simple interest.

Third, the plaintiffs challenge Sallie Mae's method of setting the first repayment date on a Consolidation or PLUS loan. Sallie Mae charges interest on these loans from the day they are disbursed and sets the borrower's first repayment date within sixty days after disbursement. Because Sallie Mae charges interest during that period of up to sixty days, the plaintiffs argue that Sallie Mae deceptively increases the cost and life span of the loan.

All told, the plaintiffs allege and have argued that Sallie Mae's loan-servicing practices violate California business, contract, and consumer-protection

law.[4] They request actual and punitive damages, restitution, and injunctive relief to prevent Sallie Mae from employing the challenged practices in the future. The United States filed a motion to intervene as a plaintiff seeking a declaratory judgment that the plaintiffs' state law claims were preempted by federal law. The district court granted the United States' motion. The parties then moved for summary judgment in whole or in part, and the plaintiffs also moved to certify the class.

The district court granted summary judgment in favor of Sallie Mae. It held that all the plaintiffs' claims were preempted by the HEA, and alternatively held that each claim failed on the merits. The district court dismissed the remaining motions as moot and entered judgment in favor of Sallie Mae. The plaintiffs timely appealed.

We have jurisdiction under 28 U.S.C. § 1291. We review the district court's grant of summary judgment de novo. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1035 (9th Cir. 2007).

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[4] The plaintiffs pleaded five causes of action: (1) engagement in unlawful, unfair or fraudulent business practices as defined by the Unfair Competition Law at California Business & Professional Code § 17200; (2) breach of contract; (3) breach of the implied covenant of good faith and fair dealing; (4) violation of the Consumer Legal Remedies Act under California Civil Code § 1770(a); and (5) unjust enrichment.

II

The Supremacy Clause of the Constitution provides that federal law "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2.[5] "Consistent with that command," the United States Supreme Court has recognized that "state laws that conflict with federal law are 'without effect.'" *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). We have succinctly delineated the Supreme Court's principles, holding: "Federal preemption occurs when: (1) Congress enacts a statute that explicitly pre-empts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field." *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1045 (9th Cir. 2000), *abrogated on other grounds by City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 431-34 (2002); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (discussing express, conflict, and field preemption); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (same).

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[5] Article VI, clause 2, states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Turning now to the issues before us, we have previously held that field preemption does not apply to the HEA. *See Keams v. Tempe Technical Inst., Inc.*, 39 F.3d 222, 225-226 (9th Cir. 1994) ("It is apparent . . . that Congress expected state law to operate in much of the field in which it was legislating."); *accord Armstrong v. Accrediting Council for Continuing Educ. and Training, Inc.*, 168 F.3d 1362, 1369 (D.C. Cir. 1999) (affirming prior holding that "federal education policy regarding [private lending to students] is not so extensive as to occupy the field"). Accordingly, under our precedent field preemption is off the table to resolve this case involving the HEA and its attendant federal regulations. The legal standards governing express preemption and conflict preemption are the standards that control our decision.

III

We focus first on the law of express preemption. The Supreme Court has made clear that Congress may indicate its intent to displace state law through express language. *Altria Group*, 129 S. Ct. at 543. Where Congress enacts an express preemption provision, our task is to interpret the provision and "identify the domain expressly pre-empted by that language." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (internal quotation marks omitted). We use the text of the provision, the surrounding statutory framework, and Congress's stated purposes in enacting the statute to determine the proper scope of an

express preemption provision. *Id.* at 485-86; *Cipollone*, 505 U.S. at 516.

Congress has enacted several express preemption provisions applicable to FFELP participants. *See, e.g.*, 20 U.S.C. §§ 1078(d), 1091a(a)(2)(B), 1091a(b)(1)-(3), 1095a(a), 1098g. These provisions expressly preempt the operation of state usury laws, statutes of limitations, limitations on recovering the costs of debt collection, infancy defenses to contract liability, wage garnishment limitations, and disclosure requirements. This last provision, 20 U.S.C. § 1098g, is entitled, "Exemption from State disclosure requirements." The text of the statute reads: "Loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act . . . shall not be subject to any disclosure requirements of any State law." *Id.* The FFELP falls within Title IV of the HEA, and is thus subject to its express preemption provision.

We conclude that 20 U.S.C. § 1098g applies to, and thus precludes, several of the plaintiffs' state law claims. Two of the plaintiffs' Unfair Competition Law claims allege that Sallie Mae employs "unfair" and "fraudulent" business practices by using billing statements and coupon books that trick borrowers into thinking that interest is being calculated via the installment method when Sallie Mae really uses a simple daily calculation. *See* Cal. Bus. & Prof. Code § 17200. A similar allegation concerns Sallie Mae's practice of using statements that set the first repayment date. Under California's Consumer Legal

Remedies Act, the plaintiffs allege that the billing statements and standardized loan applications "misrepresent[] that the Student Loans confer rights, remedies, and obligations" which do not exist, thereby constituting an unfair or deceptive practice. *See* Cal. Civ. Code § 1770(a).

At bottom, the plaintiffs' misrepresentation claims are improper-disclosure claims. The plaintiffs do not contend that California law prevents Sallie Mae from employing any of the three loan-servicing practices at issue. We consider these allegations in substance to be a challenge to the allegedly-misleading method Sallie Mae used to communicate with the plaintiffs about its practices. In this context, the state-law prohibition on misrepresenting a business practice "is merely the converse" of a state-law requirement that alternate disclosures be made. *See Cipollone*, 505 U.S. at 527.

The plaintiffs dispute this characterization of their claims, arguing that they do not seek specific disclosures, but merely seek to stop Sallie Mae from fraudulently and deceptively misleading borrowers through the written documents. But preemption cannot be avoided simply by relabeling an otherwise-preempted claim. *Id.* (recognizing that a fraudulent-misrepresentation claim was a restated failure-to-warn claim subject to express preemption). Under the very terms of the FFELP, a "misleading" disclosure would be improper. *See* 20 U.S.C. § 1082(m)(1)(B) (requiring common forms to use "clear, concise, and simple language to facilitate understanding of loan

terms and conditions by applicants"); 34 C.F.R. § 682.205(a)(1), (b), (c)(1) (requiring lenders to make a series of disclosures in "simple and understandable terms"). A properly-disclosed FFELP practice cannot simultaneously be misleading under state law, for state disclosure law is preempted by the federal statutory and regulatory scheme. We conclude that the plaintiffs' claims challenging the language in Sallie Mae's billing statements and coupon books are restyled improper-disclosure claims, and are therefore subject to express preemption under 20 U.S.C. § 1098g.[6]

The plaintiffs' remaining claims allege breach of contract, unjust enrichment, breach of the implied covenant of good faith and fair dealing, and the use of fraudulent and deceptive practices apart from the billing statements. These claims are not impacted by any of the FFELP's express preemption provisions. We next examine whether principles of conflict preemption apply to bar any of those claims.

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[6] The plaintiffs argue that our holding will leave them without a means to remedy Sallie Mae's alleged misrepresentations. We disagree. The DOE has the power to institute informal compliance procedures against a third-party servicer who is the subject of a complaint. 34 C.F.R. § 682.703. When stronger medicine is required, the DOE may file suit against the servicer, impose civil penalties, and terminate the servicer's participation in the program. 20 U.S.C. §§ 1082(a)(2), (g)(1), (h)(1). If Sallie Mae's disclosures are misleading, the plaintiffs' remedy is to complain about Sallie Mae to the DOE and to ask the agency to intervene.

IV

Addressing conflict preemption, we again may start with a principle that has been declared by the United States Supreme Court: A state law, whether arising from statute or common law, is preempted if it creates an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby,* 530 U.S. at 373 (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)). We discern congressional objectives by "examining the federal statute as a whole and identifying its purpose and intended effects." *Id.* Congress codified several explicit FFELP purposes at 20 U.S.C. § 1071(a)(1). The first is "to encourage States and nonprofit private institutions and organizations to establish adequate loan insurance programs for students in eligible institutions." *Id.* § 1071(a)(1)(A). Adequate loan insurance programs make lending to college students a less-risky proposition. Two additional FFELP purposes – "to provide a Federal program of student loan insurance," and "to guarantee a portion of each loan insured" – have the same effect. *See id.* §§ 1071(a)(1)(B), (D). By covering student loans with layers of insurance and guarantees, Congress encourages private lenders to help fund higher education. The government argues that to accomplish the goal of encouraging such lending, Congress intended that the core aspects of the FFELP be uniform. We examine the FFELP to evaluate whether it shows a preference for uniformity, and, if we find such intent demonstrated, we will determine

whether the plaintiffs' claims conflict with a policy of uniformity.

We must be cautious about conflict preemption where a federal statute is urged to conflict with state law regulations within the traditional scope of the state's police powers. When we deal with an area in which states have traditionally acted, the Supreme Court has told us to start with the assumption that a state's historic police powers will not be superseded absent a "clear and manifest purpose of Congress." *Wyeth v. Levine*, 129 S. Ct. 1187, 1195 (2009). Contract and consumer protection laws have traditionally been in state law enforcement hands. *See, e.g., Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 174 (1982); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963); *Cliff v. Payco Gen. Am. Credits, Inc.*, 363 F.3d 1113, 1125 (11th Cir. 2004). The Supreme Court has said that a "presumption against preemption" may apply to preserve state law claims in the face of preemption claims. *See Medtronic*, 518 U.S. at 485 (citing *Cipollone*, 505 U.S. at 518). Accordingly, we would not lightly decide that the plaintiffs' contract and consumer protection claims under California law are preempted by conflict preemption with the HEA. Yet, it is our duty to consider carefully what Congress was trying to accomplish in the HEA and whether these state law claims create an "obstacle" to the congressional purposes. *See Crosby*, 530 U.S. at 373.

A

In determining Congress's intent in enacting the FFELP, "we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law." *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (alteration omitted)). After reviewing the FFELP as a whole, we agree with the DOE that Congress intended it to operate uniformly. That intent is shown by the comprehensive framework that Congress set up to govern the $2 billion per year program. *See* 20 U.S.C. § 1074. The statutes describe the nuts and bolts of the FFELP, defining the required terms of each type of loan. *See id.* §§ 1078, 1078-2, 1078-3. The statutes go so far as to mandate specified repayment terms and specified insurance and guaranty requirements. *Id.* As one example, the FFELP sets the maximum interest rate that a lender may charge, depending on the type of loan and the date when it was taken out. *Id.* §§ 1077a. Such precisely-detailed provisions show congressional intent that FFELP participants be held to clear, uniform standards.

Congress's direction to the DOE shows that it aimed for uniformity of FFELP regulations. The DOE has the power to prescribe regulations necessary "to establish minimum standards" for lenders and servicers. *Id.* § 1082(a)(1). In a subsection entitled, "Uniform administrative and claims procedures," Congress tells the DOE to develop standardized forms and to require their use within the program. *Id.* § 1082(*l*)(1).

Here is Congress: "The forms and procedures [that the DOE must prescribe] shall include *all aspects of the loan process* as such process involves eligible lenders and guaranty agencies." *Id.* § 1082(*l*)(2)(A) (emphasis added). This is a clear command for uniformity. Yet another section, this one entitled "Common forms and formats," tells the DOE to "prescribe common application forms and promissory notes," including forms used by FFELP participants for funding applications, payment deferrals, and loan reporting. *Id.* § 1082(m)(1)-(3). In the rules governing the Direct Loan Program, Congress created a policy of inter-program uniformity by requiring that "loans made to borrowers [under the Direct Loan Program] shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers under [the FFELP]." *Id.* § 1087e(a)(1). Congress's instructions to the DOE on how to implement the student-loan statutes carry this unmistakable command: Establish a set of rules that will apply across the board.

Regulatory uniformity can be a helpful tool if Congress's objectives in passing the FFELP are to be realized fully. The House Committee on Education and Labor discussed the need for binding regulations during the major amendments to the FFELP in 1992. H.R. Rep. No. 102-447, at 41-42 (1992), *reprinted in* 1992 U.S.C.C.A.N. 334, 374-75. The Committee emphasized the federal nature of the program, and sought more thorough regulations that would, among other things, "ensure the stability in the loan

program." *Id.* at 41. Stability is necessarily affected by the continued participation of private lenders. One need not have an advanced degree in risk management and financial practices to believe, as we have previously suggested, that "exposure to lawsuits under fifty separate sets of laws and court systems could make lenders reluctant to make new federally-guaranteed student loans." *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1264 (9th Cir. 1996). Thus we have held that the FFELP "requires uniformly administered . . . standards in order to remain viable." *Id.* at 1266. In this sense, were the law to indulge the plaintiffs' California state law claims, and thereby to endorse the possibility of similar claims being asserted under varying state laws in each of the fifty states, it would impair and threaten the efficacy of the federal lending effort for students.

The plaintiffs' primary reply to the DOE's uniformity argument is based on the Fourth Circuit's decision in *College Loan Corp. v. SLM Corp.*, 396 F.3d 588 (4th Cir. 2005). In that suit between two lenders, the plaintiff sought to use evidence that the defendant violated the FFELP regulations to satisfy elements of various state law causes of action. *Id.* at 589, 597. The district court found the claims preempted insofar as they permitted a private entity to interpret and enforce the HEA, because only the DOE was permitted to remedy FFELP violations under the HEA, and permitting the state suit would therefore erect an obstacle to uniform FFELP enforcement. *Id.* at 593, 96-97. The Fourth Circuit reversed, explaining that

it was "unable to confirm that the creation of 'uniformity' . . . was actually an important goal of the HEA." *Id.* at 597.

College Loan is not the law of our circuit, and we do not consider the plaintiffs' argument based on it to be persuasive for the reasons we set forth above. Permitting varying state law challenges across the country, with state law standards that may differ and impede uniformity, will almost certainly be harmful to the FFELP. The costs of the program would go up and either there would be fewer loans made or loans made for lesser amounts or for higher interest, making it harder for students to gain the loan funds they need to get the education they want.

Moreover, even if within the Fourth Circuit, we would not apply *College Loan* because it is distinguishable from our case. First, *College Loan* involved a contractual relationship between lenders, which is not a relationship that the FFELP is primarily designed to govern. The Fourth Circuit stressed, "[i]mportantly, neither the district court nor the parties have explained how [the FFELP's] purposes would be compromised by a lender . . . pursuing breach of contract or tort claims against other lenders or servicers." *Id.* The situation differs where student borrowers invoke state law principles against lenders. To permit that would subject a national-level lender to the potentially varying laws of fifty states, dissuading lenders from FFELP participation and contravening the congressional purpose of facilitating student loans. Second, the plaintiff in *College Loan* sought

to enforce FFELP rules, not to vary them. *See id.* at 591-94. The plaintiff's liability theory turned on the inter-lender contract that required HEA compliance. *Id.* Using an FFELP violation there as an element of the prima facie breach claim did not undermine the regulations, and posed no threat to accomplishment of congressional purposes. *See id.* at 597-98. The situation faced by the Fourth Circuit is fundamentally different from that presented here, where the plaintiffs ask us to hold that Sallie Mae cannot rely on the FFELP statutes and regulations – at least not in California. The plaintiffs do not seek to buttress the FFELP framework, but rather to alter it in their home state. The *College Loan* analysis is inapplicable.

The plaintiffs also argue that uniformity cannot be a goal of the FFELP because the regulations set only "minimum standards" and permit flexibility within those standards. *See, e.g.*, 20 U.S.C. § 1082(a)(1) (authorizing the DOE to "establish minimum standards with respect to sound management and accountability of programs under [the FFELP]"). In particular, the plaintiffs point to regulatory flexibility with regard to the form of the billing statements and the decision about whether or not to charge late fees. *See* 34 C.F.R. §§ 682.202(f) (stating that a lender "may" charge a late fee), 682.205 (prescribing required disclosures but not a specific billing or disclosure form).

But the presence of some flexibility in the regulations does not mean that regulatory uniformity is not vital to the FFELP's success. Federal regulators

often include calculated flexibility within their programs without violating congressional intent to have a federal program uniformly control. In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), for example, a Department of Transportation regulation "deliberately provided [car manufacturers] with a range of choices among different passive restraint devices" after determining that doing so would maximize the congressional objective of road safety. *Id.* at 875. The flexibility in the regulation did not mean, as the plaintiffs would have us conclude here, that state law could further restrict the car manufacturers' choices. Rather, the flexible federal standard alone governed. *Id.* at 881.

Fidelity Federal Savings and Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982), involved a similarly flexible regulation.

There, the Federal Home Loan Bank Board issued a regulation permitting savings and loan associations to include a due on sale clause in a mortgage contract "at its option." *Id.* at 147. The flexible policy was critical to the financial stability of the lending institutions, which in turn furthered the congressional purpose of encouraging associations to provide affordable credit for home purchases. *Id.* at 168; *see also* 12 U.S.C. § 1464(a) ("The lending and investment powers conferred by this section are intended to encourage [Federal savings associations] to provide credit for housing safely and soundly."). Because the permissive policy was "essential to the economic soundness of the thrift industry," only the federal

regulation, and not a stricter California-law rule, was permitted to operate. *de la Cuesta*, 458 U.S. at 170.

Geier and *de la Cuesta* suggest that a uniform federal regulatory scheme can nevertheless contain a measure of flexibility within it. In this case, the DOE policy of permitting, but not requiring, lenders to charge late fees does not automatically mean that state law may operate freely. The same can be said for the disclosure requirements, which set out the mandatory elements but do not dictate the precise billing form Sallie Mae must use. The measured flexibility embodied in the DOE regulations does not contradict the overall purpose of nationwide regulatory uniformity that will be enhanced by a holding that the federal statute and federal regulations exclusively govern the uniform application of standards for the FFELP.

In sum, we agree with the DOE that Congress intended uniformity within the program. The statutory design, its detailed provisions for the FFELP's operation, and its focus on the relationship between borrowers and lenders persuade us that Congress intended to subject FFELP participants to uniform federal law and regulations. *See Gade*, 505 U.S. at 99.

B

Having determined that Congress intended the FFELP to operate uniformly, we revisit and elaborate on whether the California state law claims would stand as an obstacle to the FFELP's uniform operation. The

DOE contends that application of California law here to the FFELP is an obstacle. We describe the agency's regulations on interest calculation, late fees, and the repayment start date, and then determine whether to defer to the DOE's view that permitting challenge under California law creates an obstacle to the regulations' uniform implementation.

The DOE's position on late fees and the repayment start date is straightforward. The FFELP regulations permit lenders to charge a late fee of up to six percent, if permitted by the borrower's promissory note, when a borrower "fails to pay all or a portion of a required installment payment within 15 days after it is due." 34 C.F.R. § 682.202(f)(2). The DOE contends that the plaintiffs' position – that California law prohibits the imposition of a late fee when daily simple interest is used – would create an obstacle to the uniform regulatory system that permits late fees. The conflict does not vanish, according to the DOE, merely because the regulation permits, but does not require, late fees. *See de la Cuesta*, 458 U.S. at 155 (accepting a nearly identical argument made by the Federal Home Loan Bank Board).

The DOE makes a similar argument about the repayment start date. The plaintiffs challenge Sallie Mae's practice of setting the repayment start date "as close as possible" to sixty days after disbursement, claiming that this practice allows Sallie Mae unfairly to collect additional interest. The DOE responds that Sallie Mae is authorized by statute and regulation to set the first repayment date up to sixty days out.

See 20 U.S.C. §§ 1078-2(d)(1), 1078-3(c)(4); 34 C.F.R. §§ 682.209(a). To the extent that California law may lessen the sixty-day window, the DOE urges that state law would create an obstacle to the uniform administration of the FFELP.

To our thinking, the DOE position on late fees and the repayment start date makes sense. If federal law permits late fees and gives up to sixty days for repayment, to say that state law prohibits late fees and requires a prompter repayment period is in conflict. We therefore agree with the DOE that the plaintiffs' claims create a conflict with federal law on these two issues.

The DOE position on the interest charges is persuasive to us. The parties dispute whether, and how, the FFELP could work if participants were permitted to use varying methods of calculating interest. The plaintiffs claim that nothing bars Sallie Mae from using the installment method to service their loans, under which the interest amount is fixed at the beginning of the repayment period. The DOE counters that Sallie Mae is required by the regulatory framework to use the daily simple interest method. Although there is no regulation that explicitly requires lenders and third-party servicers to use the daily simple method, the DOE points to several sources that make the daily method a practical requirement. In particular, lenders must calculate the interest that the DOE pays on a subsidized Stafford Loan based on a balance calculation for "each day" in a given quarterly period. 34 C.F.R. § 682.304(b)-(c).

That requirement would not be satisfied merely through use of the installment method. The record demonstrates that the DOE uses the daily method of calculation when it loans money to students directly, and also that the statutorily-prescribed common forms for Consolidation Loans require the consolidation lender to use the daily simple method. When viewed as a whole, the DOE argues that the FFELP scheme works only if all participants use the same method of calculating interest.

We are persuaded by the DOE's view that the plaintiffs' interest-rate claims, if successful, would create an actual conflict with federal law. First, as noted earlier, Congress has granted the DOE broad authority to implement the FFELP. *See* 20 U.S.C. § 1082(a)-(p). Congress granted the DOE the power to prescribe regulations, access lender records, audit participants, impose civil penalties, suspend or terminate lenders from the program, and sue regulatory violators. *Id.* A grant of "ample authority" to regulate a detailed legislative scheme, such as the one administered by the DOE here, is evidence that Congress intended the agency to have the authority to preempt state law. *See de la Cuesta,* 458 U.S. at 159.

Second, in explaining how the interest calculation and transfer components of the FFELP work, the DOE is engaged in interpreting its own regulations. An agency's interpretation of its own regulations is "controlling" unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins,* 519 U.S. 452, 461 (1997). The Supreme Court has described this

standard as "deferential," *id.*, and this deference is particularly appropriate where the subject matter is technical and the relevant background complex. *See Geier*, 529 U.S. at 883. Under such circumstances, "[t]he agency is likely to have a thorough understanding of its own regulation and its objectives and is uniquely qualified to comprehend the likely impact of state requirements." *Id.* (internal quotation marks omitted). Here, the government intervened at the trial level to explain the "extensive and comprehensive regulations" governing the multilayered transactions taking place between borrowers, lenders, private guaranty agencies, and the DOE. These include the frequent payments of interest by borrowers and the DOE. The DOE made clear that the imposition of fifty sets of state law governing the calculation of interest would threaten its ability to carry out the congressional objectives of ensuring uniformity and stability within the program.

Finally, the DOE contends that allowing states to impose varying interest-calculation requirements would compromise related loan programs, operated by the government, that depend on cross-program uniformity. These interpretations of the likely effect of state law on the FFELP are reasonable and within the DOE's statutory grant of authority. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173-74 (2007). We therefore defer to them.

Our analysis is not altered by the fact that the DOE has not promulgated a regulation explicitly stating the preemptive effect of its regulations. "Where,

as here, an agency's course of action indicates that the interpretation of its own regulation reflects its considered views . . . we have accepted that interpretation as the agency's own, even if the agency set those views forth in a legal brief." *Id.* at 171 (citing *Auer*, 519 U.S. at 462). Deference can be appropriate even when an agency position was developed in response to the litigation under review, provided that the position does not prove to be a "post hoc rationalization" that "does not reflect the agency's fair and considered judgment on the matter in question." *Id.* (alteration and emphasis omitted). Here, there is no evidence that the DOE's position represents anything other than its considered view of the need for a uniform regulatory framework. First, intervenor DOE was not named as a defendant in this lawsuit, so it cannot be accused of creating a post hoc rationalization to avoid liability for itself. Second, the standardized forms – signed by the plaintiffs – were promulgated by the DOE long before this litigation arose. Those forms contain the "simple interest" and "daily simple interest" language that the DOE now cites in support of its position. Moreover, the DOE itself uses the method of calculating interest that it claims Sallie Mae is bound by, and cites the detailed information about interest calculations that it posts to its website and publishes in a pamphlet available to borrowers. The DOE has consistently implemented its uniform policy, and there is nothing to signal that deference to its position is unwarranted. "The failure of the Federal Register to address pre-emption explicitly is thus not determinative." *Geier*, 529 U.S. at 884.

The plaintiffs argue that the DOE's interpretation merits no deference, citing to the Supreme Court's recent opinion in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). We do not agree that *Wyeth* commands that we accord no weight to the DOE's view. In *Wyeth*, the Supreme Court evaluated the preamble to a Food and Drug Administration (FDA) regulation which purported to preempt any contrary state law. *Id.* at 1200. The Court declined to defer to the conclusory statement of preemption embodied in the preamble, instead "perform[ing] its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of preemption." *Id.* at 1201. The Court's independent review revealed that all evidence of congressional intent pointed away from preemption, and that the FDA had recently, abruptly, and sweepingly changed its view about the preemptive role of its regulations. *Id.* at 1201-03.

No such circumstances are present here. Unlike the FDA's position in *Wyeth*, here the DOE's position about the FFELP's purpose of uniformity is in harmony with the evidence of congressional intent. The plaintiffs have cited us to no evidence of a "dramatic change in position" of the kind that concerned the Supreme Court in *Wyeth*. *See id.* at 1203. Because our independent review of the state and federal laws implicated by this dispute leads us to agree with the DOE that the plaintiffs' suit poses an obstacle to the uniform implementation of the FFELP sought by Congress, we accord the agency interpretational deference. *See id.* at 1201 (citing *Geier*, 529 U.S. at 883).

V

In conclusion, the plaintiffs' allegations that Sallie Mae makes fraudulent misrepresentations in its billing statements and coupon books are expressly preempted by the HEA, and conflict preemption prohibits the plaintiffs from bringing their remaining claims because, if successful, they would create an obstacle to the achievement of congressional purposes. Having carefully considered the FFELP and the purposes of Congress in the HEA, we conclude, beyond any doubt, that subjecting the federal regulatory standards to the potentially conflicting standards of fifty states on contract and consumer protection principles would stand as a severe obstacle to the effective promotion of the funding of student loans. Such an obstacle, which we consider hostile to the purposes of Congress in this program, must bow to the overriding principles of conflict preemption and federal law supremacy.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANN CHAE, et al., Plaintiffs, v. SLM CORPORATION, et al., Defendants, and UNITED STATES OF AMERICA, Intervenor-Plaintiff.	Case No. CV07-02319 R (RCx) **JUDGMENT BY COURT UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE** Assigned to the Hon. Manuel L. Real Date: June 16, 2008 Time: 10:00 a.m. Place: Courtroom 8

JUDGMENT

On June 16, 2008, this Court granted the motion of defendants SLM Corporation, Sallie Mae, Inc., and Sallie Mae Servicing Corporation ("Sallie Mae") for summary judgment, made under Rule 56 of the Federal Rules of Civil Procedure, and ordered that judgment be entered for defendants against plaintiffs Ann Chae, William Coakley, Carlos Pineda, and Hoon Koo. The Order rendered moot plaintiffs' motion for partial summary judgment, plaintiffs' motion for class certification, and the motion for summary judgment filed by intervenor-plaintiff United States of America.

In accordance with that Order,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Judgment shall be and hereby is entered in favor of the defendants Sallie Mae;

2. Plaintiffs shall take nothing from Sallie Mae; and

3. Plaintiffs' claims are dismissed in all respects with prejudice.

Dated: June 25, 2008

/s/ Real
The Honorable Manuel L. Real
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANN CHAE, et al., Plaintiffs, v. SLM CORPORATION, et al., Defendants, and UNITED STATES OF AMERICA, Intervenor-Plaintiff.	Case No. CV07-02319 R (RCx) DEFENDANTS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW Assigned to the Hon. Manuel L. Real Date: June 2, 2008 Time: 10:00 a.m. Place: Courtroom 8 (Filed Jun. 16, 2008)

Defendants Sallie Mae, Inc. ("Sallie Mae"), SLM Corporation and Sallie Mae Servicing Corporation[1] submit the following Statement of Uncontroverted Facts and Conclusions of Law in support of their Motion for Summary Judgment:

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[1] Defendant Sallie Mae, Inc. is the only one of the named defendants that currently services student loans. SLM Corporation is a holding company that owns Sallie Mae, Inc. *See* Exh. 1 at ¶ 4 (Declaration of Mary K. Stewart). Sallie Mae Servicing Corporation is a corporation that no longer exists. Sallie Mae Servicing Corporation was converted into Sallie Mae Servicing LP, and Sallie Mae Servicing LP was subsequently merged into Sallie Mae, Inc. on December 31, 2003. *Id.* at ¶ 5.

I. UNCONTROVERTED FACTS

1. Sallie Mae is engaged in the business of processing and servicing student loans, including student loans authorized and regulated by the Federal Family Education Loan Program ("FFELP"). *See* Exh. 2 at ¶ 3 (Declaration of Jerry Maher). There are three types of FFELP loans – (a) Stafford Loans, which are made to students, (b) PLUS Loans, which are made to parents of students and which have also been available to graduate students since 2006, and (c) Consolidation Loans, which are used to consolidate and replace other student loans. *Id.*; *see also* Am. Complaint ¶¶ 33-36.

2. Plaintiffs Ann Chae, William Coakley and Carlos Pineda currently have Consolidation Loans serviced by Sallie Mae, and previously had Stafford Loans serviced by Sallie Mae. *See* Am. Complaint ¶¶ 10, 11, 13; Exh. 44 (Loan Consolidation Statement and Repayment Schedule of Carlos A. Pineda, dated November 22, 2003); Exh. 29 (Payment Schedule of William J. Coakley, dated January 31, 1997); Exh. 35 (Payment Schedule of Ann Y. Roh, dated September 30, 1999).

3. Plaintiff Hoon Koo has never had a Consolidation Loan, but he previously had four Stafford Loans serviced by Sallie Mae. *See* Exh. 3 (Extracts of Koo dep. at 11:15-17, 28:20-29:1); *see also* Exh. 4 (Payment Schedule of Hoon Koo, dated January 26, 1998; Exh. 5 (Payment Schedule of Hoon Koo, dated January 26, 1998; Exh. 6 (Payment Schedule of Hoon

Koo, dated March 4, 1998); Exh. 7 (Payment Schedule of Hoon Koo, dated March 11, 1998 (SLM 0000447-48)); Am. Complaint ¶ 12.

4. None of the Plaintiffs has ever had a PLUS Loan. *See* Exh. 8 (Extracts of Chae Dep.) at 81:1-5; Exh. 9 (Extracts of Coakley Dep.) at 43:16-25; Exh. 10 (Extracts of Pineda Dep.) at 40:11-16; Exh. 3 (Extracts of Koo Dep.) at 11:4-11, 147:10-14.

Sallie Mae's Loan Servicing Practices

5. Sallie Mae services both FFELP loans owned by its affiliates and FFELP loans owned by unaffiliated lenders and entities that hire it to provide loan servicing functions on their behalf. Loan servicing involves a number of ministerial tasks, including the collection and processing of loan payments, the assessment and collection of late fees, and the issuance of notices required by the federal regulatory program that governs FFELP loans. Exh. 2 at ¶ 4 (Maher Decl.).

6. When servicing FFELP loans owned by unaffiliated lenders and entities, Sallie Mae does not retain any of the principal or interest payments made on the loans. Those payments are transferred to the owners of the loans. Exh. 2 at ¶ 5 (Maher Decl.).

7. During the period since April 6, 2003, lenders who make FFELP loans have been required to provide borrowers with standardized loan applications and promissory notes prepared by the United States

Department of Education ("DOE"), which is the federal agency responsible for regulating FFELP and other student loan programs. *See* Exh. 11 at ¶ 7 (Declaration of Daniel T. Madzelan). Loan servicers have also been required to provide loan disclosure statements and repayment schedules that conform to DOE regulatory requirements. 20 U.S.C. § 1083; 34 C.F.R. § 682.205.

8. In servicing FFELP Loans, Sallie Mae charges daily simple interest on the outstanding principal balance of each loan. Exh. 12 at 5 (Extract of Defendant's Supplemental Objections and Responses to Plaintiffs' First Set of Interrogatories). Under this method, interest is charged only for the exact number of days that loan principal is outstanding. Exh. 14 at 4-5 (Department Of Education, REPAYING YOUR STUDENT LOANS, *available at* http://studentaid.ed.gov/students/attachments/siteresources/RepayingYourStudentLoansEnglish2003_04.pdf).

9. In servicing FFELP Loans, Sallie Mae provides each borrower with a repayment schedule that specifies the borrower's monthly payment due dates and the monthly payment amounts necessary to repay the principal and interest on the loan. The monthly payment amounts are calculated on the assumption that each payment will be received exactly on the scheduled due date. *See, e.g.*, Exh. 4-7; Exh. 19 (Federal Consolidation Loan Application and Promissory Note of Ann Y. Roh, dated February 24, 2005); Exh. 20 (Federal Consolidation Loan Application and Promissory Note of Carlos A. Pineda, dated August

14, 2003). If a payment is not received on the exact due date, the daily interest method results in interest being charged only for the number of days since the last payment was received. *Id.*; *see also* Exh. 13. Thus, if payment is received 20 days after the prior payment, only 20 days of interest is deducted from that payment and the rest is applied to reduce principal. Similarly, if a payment is received 40 days after the last payment, 40 days of interest is deducted from the monthly payment and the rest is used to reduce principal.

10. In servicing Stafford Loans, Sallie Mae charges interest from the date the loan funds are disbursed. If the loan is "unsubsidized," Sallie Mae charges all such interest to the borrower. If the loan is "subsidized," the federal government pays the interest that accrues during the period the borrower is in school on at least a half-time basis, during other authorized periods of "deferment," and during a six-month "grace period" that immediately follows the date the student stops attending school on a full or half-time basis. The borrower is charged for interest that accrues during all other periods. *See, e.g.*, Exh. 15 (Application and Promissory Note for Stafford Loan for Hoon Koo, dated August 25, 1993); Exh. 16 (Application and Promissory Note for Stafford Loan for Hoon Koo, dated October 8, 1994); Exh. 17 Application and Promissory Note for Stafford Loan for Hoon Koo, dated September 7, 1995); Exh. 18 (Application and Promissory Note for Stafford Loan for Hoon Koo, dated October 27, 1996).

11. In servicing Consolidation and PLUS Loans, Sallie Mae charges the borrower interest from the date the loan funds are disbursed, and sets the first payment due date to be within sixty days after the loan funds are disbursed. *See, e.g.*, Exh. 19 (Federal Consolidation Loan Application and Promissory Note of Ann Y. Roh, dated February 24) 2005 (SLM-0000070); Exh. 20 (Federal Consolidation Loan Application and Promissory Note of Carlos A. Pineda, dated August 14, 2003 (SLM-0000517)); *see also* Exh. 21 (Federal PLUS Loan Application and Master Promissory Note (SLM-0002058, 0002062)).

12. When permitted by the borrower's promissory note, Sallie Mae charges a late fee on FFELP loan payments that are made more than fifteen days after their scheduled due dates. The late fee is equal to a percentage of the amount that is overdue. Exh. 19-21.

DOE's Loan Servicing Practices, Web Site And Loan Verification Certificate Form

13. DOE is the federal agency responsible for regulating FFELP loans. Exh. 11 (Declaration of Daniel T. Madzelan). DOE also makes loans directly to students and students' parents through the Direct Loan Program, another student loan program authorized by federal statute. Exh. 22 (Extracts of Madzelan Dep.) at 230:4-231:11.

14. The Direct Loan Program, like the FFEL Program, provides Stafford Loans, PLUS Loans and

Consolidation Loans to students or their parents. *Id.* at 230:4-231:11.

15. When it makes Stafford Loans, PLUS Loans and Consolidation Loans under the Direct Loan Program, DOE charges the borrower daily simple interest. *Id.* at 233:4-15.

16. When it pays interest on behalf of a borrower who has a subsidized FFELP loan, DOE pays daily interest to the loan holder. *Id.* at 234:16-236:9.

17. DOE makes information about student loans available to borrowers over its web sites. Exh. 23 (Extracts of Marinucci Dep.) at 34:9-13.

18. DOE's web site includes a publication entitled "Repaying Your Student Loans," in which DOE states that daily simple interest is used for all types of student loans regulated by the agency. *See id.* at 40:2-41:9.

19. DOE's web site states that daily simple interest is used for all federally guaranteed student loans. *See* Exh. 24 (Department Of Education, http://studentaid.ed.gov/PORTALSWebApp/students/english/repaying.jsp).

20. DOE's web site on Direct Loans states that daily simple interest is also used for Stafford, PLUS and Consolidation Loans that DOE makes under the Direct Loan Program. Exh. 25 (Department of Education, www.dlssonline.com/borrower/QctrHelpIndex.do?SectionID=CintDef).

21. When a borrower seeks to replace other student loans with a FFELP Consolidation Loan, the Consolidation lender obtains loan payoff information for the existing loans through a Loan Verification Certificate that has been prepared by DOE and printed by the United States Office of Management and Budget ("OMB"). *See* Exh. 22 (Madzelan dep.); 239:23-241:20; Exh. 26 (Federal Loan Verification Certificate, expiration date 1/31/2010). The Loan Verification Certificate requires the existing lenders to provide the amount of "Daily Interest Accrual" on each student loan to be consolidated. *See id.* at p. 1, Item 15. The Loan Verification Certificate also provides the following instruction for calculating the "Daily Interest Accrual" on student loans:

> **Item 15:** Enter the daily interest accrual factor (per diem) used in completing Item 14 for each loan. The interest accrual factor is calculated by multiplying the outstanding principal balance of the loan by the interest rate divided by 365.25 or the actual number of days in the calendar year.

Id. at p. 2; *see also* Exh. 27 (Federal Loan Verification Certificate, expiration date 10/31/2006); Exh. 28 (Federal Loan Verification Certificate).

Plaintiff William Coakley's Loans

22. Between 1992 and 1995, Plaintiff Coakley obtained a series of Stafford Loans from Bank of

America. *See* Exh. 29 (Payment Schedule of William J. Coakley, dated January 31, 1997).

23. On February 22, 1996, Bank of America notified Coakley that it had arranged for Sallie Mae to service his loans. *See* Exh. 30 (Letter from Bank of America to William J. Coakley, dated February 22, 1996).

24. Following Coakley's graduation from college, Sallie Mae sent him a January 31, 1997 payment schedule for his Stafford Loans. Exh. 29; Exh. 9 (Coakley Dep.) at 213:18-214:3, 214:16-25. The payment schedule notified Coakley that the first payment on his Stafford Loans would be due on March 4, 1997 and it stated, in part:

> Interest on your loans accrues on a daily, simple interest basis.
>
> * * *
>
> **Late charge:** If a payment is late by more than 10 days, you may be subject to a late charge of up to 6% of the payment as authorized by your promissory note.

Exh. 29.

25. Coakley has testified that, when he received the January 31, 1997 payment schedule for his Stafford Loans, he was aware that interest on his Stafford Loans was accruing on a daily basis and that he could be charged a late fee for payments that were made more than ten days after their scheduled due dates. Exh. 9 (Coakley Dep.) at 215:17-216:1, 219:3-15.

26. Six days after the first payment due date on his Stafford Loans, Coakley submitted an application for a Consolidation Loan to replace all of his Stafford Loans. Coakley signed the Application and Promissory Note for his Consolidation Loan on March 10, 1997. Exh. 31 Consolidation Loan Application/ Promissory Note of William J. Coakley, dated March 10, 1997); Exh. 9 (Coakley Dep.) at 47:9-11, 55:8-57:6.

27. Coakley's Consolidation Loan Application and Promissory Note states, in part:

> **I**, the undersigned borrower, **promise** to pay to the Student Loan Marketing Association (Sallie Mae) . . . such loan amount as is advanced on my behalf, **to pay daily simple interest on the unpaid principal balance** thereof . . . , **and to pay all late charges**. . . . My signature below certifies that I have read, understood and agreed to the conditions and authorizations stated in the terms herein and on the reverse side hereof. . . . [Exh. 31 at SLM-0000185 (emphasis added)].
>
> * * *
>
> 1. . . . . This loan will bear daily simple interest. . . . [*Id.* at SLM-0000186].
>
> 2. I will pay all interest that accrues on this loan commencing on the date of disbursement. [*Id.*].
>
> * * *

> My first payment will be due within sixty days of the date of disbursement of my [Consolidation Loan] Account unless I am eligible for deferment. [*Id.*]
>
> * * *
>
> **Late Charge** Sallie Mae may collect from me a late charge if I fail to pay all or part of a required installment within 10 days after it is due. . . . A late charge may not exceed 6 cents for each dollar of each late installment. [*Id.*].

28. Coakley has testified that, when he signed his Consolidation Loan Application and Promissory Note on March 10, 1997, he understood and agreed that:

> a. He was promising to pay daily simple interest on his loan. Exh. 9 (Coakley Dep.) at 58:16-59:25, 61:25-62:23.
>
> b. He was promising to pay all interest that accrued from the date his loan funds were disbursed. *Id.* at 61:8-24.
>
> c. His first payment would be due within sixty days after his loan funds were disbursed. *Id.* at 65:22-67:3.
>
> d. He was promising to pay all late charges that might be imposed. *Id.* at 60:1-14, 64:5-65:4.
>
> e. His Consolidation Loan would be governed by federal law. *Id.* at 57:19-58:15.

29. As a result of Coakley's periodic failures to make loan payments on time, Sallie Mae has sent him at least fourteen notices reminding him that he could be charged late fees for late payments. These notices were sent to him between April 1999 and September 2006. *See* Exh. 32 (Late Notices sent to William J. Coakley between April 1999 and September 2006); Exh. 9 (Coakley Dep.) at 159:1-161:16, 163:24-165:19, 166:4-168:13, 174:6-178:5.

Plaintiff Ann Chae's Loans

30. In 1997 and 1998, Plaintiff Ann Chae obtained a series of Stafford Loans from Wells Fargo Bank. Exh. 33 (Application and Promissory Note for Federal Stafford Loan of Ann Y. Roh, dated August 26, 1997); Exh. 34 (Application and Promissory Note for Federal Stafford Loans of Ann Y. Roh, dated August 17, 1998); Exh. 8 (Chae Dep.) at 81:20-23, 105:25-107:7, 120:24-121:24.

31. To obtain her 1997 and 1998 Stafford Loans, Chae signed two Applications and Promissory Notes which stated, in part:

> Interest accrues on the unpaid principal balance of each loan from the date of disbursement by the lender until the entire principal balance is paid in full. I agree to pay all interest charges on my unsubsidized Federal Stafford Loan. I agree to pay all interest charges on my subsidized Federal Stafford Loan except interest payable by the federal government under the Act.

* * *

> If I fail to make any part of an installment payment within 10 days after it becomes due, the holder may collect from me a late charge not to exceed 6% of each late installment.

Exh. 33, 34.

32. Chae has testified that, when she signed her 1997 and 1998 Stafford Loan Applications and Promissory Notes, she understood that:

> a. Interest would begin to accrue on her unsubsidized Stafford Loans from the dates the loan funds were disbursed, and she would have to pay that interest. Exh. 8 (Chae Dep.) at 113:3-114:5, 122.21-124:13.
>
> b. She could be charged a late fee if she made a payment more than 10 days after its scheduled due date. *Id.* at 112:3-23, 124:14-125:5.

33. Following her completion of school, Sallie Mae sent Chae a September 30, 1999 payment schedule for her Stafford Loans. Exh. 35 (Payment Schedule of Ann Y. Roh, dated September 30, 1999); Exh. 8 (Chae Dep.) at 134:20-135:2. The payment schedule notified Chae that the first payment on her Stafford Loans would be due on December 20, 1999 and it stated, in part:

> Interest on your loans accrues on a daily, simple interest basis.

* * *

> **Late charge** – You may be charged a late fee, not to exceed 6% of the installment amount of your loan(s), if you fail to make your payment within 15 days after it is due.

Exh. 35; Exh. 8 (Chae Dep.) at 136:19-25.

34. Chae has testified that, when she received her September 30, 1999 payment schedule, she understood that:

> a. If she did not make her loan payments on the scheduled due dates, the amount of interest she would pay might vary from the estimated interest listed on her payment schedule. Exh. 8 (Chae Dep.) at 139:6-25.
>
> b. She could be charged a late fee if she did not make her payments on time. *Id.* at 141:3-142:4.

35. On February 24, 2005, Chae signed an Application and Promissory Note for a Consolidation Loan to replace her Stafford Loans. Exh. 19; Exh. 8 (Chae Dep.) at 158:4-21; Exh. 35. Chae's Consolidation Loan Application and Promissory Note was a DOE-prepared form bearing the stamp of the United States Office of Management and Budget. Exh. 19.

36. Chae's Application and Promissory Note for her Consolidation Loan stated, in part:

> At or about the time my Federal Consolidation Loan is disbursed, a disclosure statement and repayment schedule ("disclosure")

will be provided to me. This disclosure will identify my Federal Consolidation Loan amount and additional terms of the loan. If I have questions about the information disclosed, I will contact the lender. If the information in this Note conflicts with information in the disclosure, the specific terms and information in the disclosure apply to my loan. [*Id.* at 5].

Interest accrues on the unpaid principal balance of my Federal Consolidation Loan from the date of disbursement by the lender until the entire principal balance is paid in full. [*Id.*].

I will be responsible for the interest that begins accruing upon disbursement of my loan. [*Id.*].

Except for any portion of the Federal Consolidation Loan attributable to a HEAL Loan, this loan will bear simple interest at an annual rate that is fixed for the term of the loan. [*Id.*].

The lender may collect from me: (1) a late charge for each late installment payment if I fail to make any part of a required installment payment within 15 days after it becomes due. . . . [*Id.*].

I am obligated to repay the full amount of the loan made under this Note and the interest that accrues on that amount. Repayment begins upon disbursement of the loan,

> and my first payment will be due within 60 days after the disbursement. [*Id.*].
>
> Payments submitted by me or on my behalf (exclusive of refunds) may be applied first to late charges and collection costs that are due, then to accrued interest that has not been capitalized, and finally to the principal amount. [*Id.*].
>
> Interest will be charged from the date my Federal Consolidation Loan is disbursed. It is my responsibility to pay interest on my loan. [*Id.* at 8].

37. Before the loan funds for Chae's Consolidation Loan were disbursed, Sallie Mae sent her the Consolidation Loan Disclosure Statement and Repayment Schedule referenced in her promissory note. Exh. 36 (Loan Consolidation Disclosure Statement and Repayment Schedule of Ann Y. Roh, dated March 29, 2005); Exh. 8 (Chae Dep.) at 173:10-25. The Disclosure Statement and Repayment Scheduled stated:

> This statement provides the terms and conditions for repayment of the consolidation loan between you and the consolidating lender listed.

Exh. 36 at 1; Exh. 8 (Chae Dep.) at 173:10-174:13. It also informed her that interest on her Consolidation Loan would begin to accrue on April 1, 2005, her first payment would be due on May 28, 2005, her subsequent payments would be due on the 28th of each month, and her estimated finance charges over the

twenty-year life of the loan would be $9,698.16. Exh. 36. It additionally explained that:

> [The Finance Charges section on the schedule] [i]ndicates an estimate of the total finance charge the actual finance charge will depend upon the timely payment of amounts owed and the use of deferment and/or forbearance provisions of the Federal Loan Consolidation Loan Program. [*Id.* at SLM-0000076].
>
> TOTAL OF PAYMENTS: Total of payments is based upon the assumption that all payments will be made on the scheduled due dates. Accordingly, if payments are made earlier than scheduled, less interest will be paid than is contemplated by the schedule. If payments are made late, additional interest will accrue beyond the scheduled payment due date. The amount of the final payment will be adjusted upward or downward to reflect the balance due based upon the actual payment dates. [*Id.* at SLM-0000077].
>
> EXPLANATION OF FEES: If a payment is late by more than 15 days, you may be subject to a late charge not to exceed 6% of the payment. [*Id.*].

38. Chae has testified that, when she received her disclosure statement in 2005, she understood that:

> a. The estimated finance charge was based on the assumption that each payment would be made on a timely basis. Exh. 8 (Chae Dep.) at 179:9-180:9.

b. She could be charged a late fee of up to 6% of the late payment if she made a payment more than 15 days past its scheduled due date. *Id.* at 183:6-184:1.

Plaintiff Carlos Pineda's Loans

39. In 1990, Plaintiff Carlos Pineda obtained a Stafford Loan from Great Western Savings. Exh. 37 (Application/Promissory Note for Stafford Student Loan of Carlos A. Pineda, dated October 30, 1990); Exh. 10 (Pineda Dep.) at 134:7-135:1, 140:2-5. No payments were made on this loan between July 13, 1995 and June 20, 2003 due to deferments and forbearances that Mr. Pineda requested. Exh. 38 (Declining Balance Payment History for Sallie Mae Loan 2 of Carlos A. Pineda, dated October 30, 1990); Exh. 39 (Letter to Carlos A. Pineda, dated March 15, 2003); Exh. 10 (Pineda Dep.) at 35:20-23, 154:1-157:10, 157:18-158:3, 169:24-170:21, 171:3-172:15.

40. Pineda has testified that he did not suffer any harm on his 1990 Stafford Loan. Exh. 10 (Pineda Dep.) at 157:18-158:3, 159:2-5.

41. In 1998, 1999, 2000 and 2001, Pineda obtained a series of Stafford Loans from Chase Ed Finance. Exh. 40 (Application and Promissory Note for Federal Stafford Loan of Carlos A. Pineda, dated August 31, 1998); Exh. 41 (Application and Promissory Note for Federal Stafford Loan of Carlos A. Pineda, dated July 15, 1999); Exh. 42 (Federal Stafford Loan Master Promissory Note of Carlos A.

Pineda, dated July 12, 2000); Exh. 43 (Federal Stafford Loan Master Promissory Note of Carlos A. Pineda, dated July 23, 2001); Exh. 10 (Pineda Dep.) at 172:20-173:9, 174:3-22, 186:23-187:6, 203:2-204:2, 215:7-14. Mr. Pineda never made any payments on those loans before he replaced them with a Consolidation Loan. *Id.* at 234:7-11, 235:3-17, 239:22-240:3.

42. On August 14, 2003, Pineda submitted an application and promissory note for a Consolidation Loan to replace all of his existing student loans. Exh. 20; Exh. 10 (Pineda Dep.) at 48:11-49:6. The application and promissory note stated, in part:

> At or about the time my former loans are discharged, a disclosure statement and repayment schedule ("disclosure") will be issued to me identifying the amount of the Federal Consolidation Loan and additional terms of the loan. If I have questions concerning the information disclosed, I will contact the lender. If the disclosure includes specific terms and information about my loan that are different from the terms and information in the Note, the specific terms and information on the disclosure apply to my loan. Exh. 20 at SLM-0000517.
>
> Interest accrues on the unpaid principal balance of my Federal Consolidation Loan from the date of disbursement by the lender until the loan is paid in full. I agree to pay interest on the principal amount of my loan from the date of disbursement until the loan is paid in

> full except interest payable by the federal government under the Act. [*Id.*].
>
> Except for any portion of the Federal Consolidation Loan attributable to a HEAL, the loan will bear simple interest at an annual rate which is fixed for the term of the loan. [*Id.*].
>
> The lender may collect from me: (i) a late charge for each late installment payment if I fail to make any part of a required installment payment within 15 days after it becomes due. . . . [*Id.*].
>
> I am obligated to repay the full amount of the loan made under this Note and the interest that accrues on that amount. Repayment shall begin upon disbursement; the first payment will be due within 60 days after the disbursement of my Federal Consolidation Loan. Payments will be scheduled in monthly installments according to the disclosure. Payments submitted by me or on my behalf (exclusive or refunds) may be applied first to late charges and collection costs that are due, then to accrued interest that has not been capitalized, and finally to the principal amount. [*Id.*].

43. Before the loan funds for Pineda's Consolidation Loan were disbursed, Sallie Mae sent him the Consolidation Loan Disclosure Statement and Repayment Schedule referenced in his promissory note. Exh. 44 (Loan Consolidation Statement and Repayment Schedule of Carlos A. Pineda, dated

November 22, 2003). The Disclosure Statement and Repayment Scheduled stated:

> This statement provides the terms and conditions for repayment of the consolidation loan between you and the consolidating Lender listed.

Id. at SLM-0000520. It also informed him that interest on his Consolidation Loan would begin to accrue on November 28, 2003, his first payment would be due on January 27, 2004, his subsequent payments would be due on the 27th of each month, and his estimated finance charges over the twenty-five year life of the loan would be $19,737.39. *Id.* It additionally explained that:

> [The Finance Charges section on the schedule] [i]ndicates an estimate of the total finance charge – the actual finance charge will depend upon the timely payment of amounts owed and the use of deferment and/or forbearance provisions of the Federal Loan Consolidation Loan Program. [Exh. 44 at SLM-0000520].
>
> TOTAL OF PAYMENTS: Total of payments is based upon the assumption that all payments will be made on the scheduled due dates. Accordingly, if payments are made earlier than scheduled, less interest will be paid than is contemplated by the schedule. If payments are made late, additional interest will accrue beyond the scheduled payment due date. The amount of the final payment will be adjusted upward or downward to

> reflect the balance due based upon the actual payment dates. [Exh. 44 at SLM-0000521].
>
> EXPLANATION OF FEES: If a payment is late by more than 15 days, you may be subject to a late charge not to exceed 6% of the payment. [*Id.*].
>
> PAYMENT PROCESSING: You may prepay your loan at any time without penalty. All payments are posted effective the date they are received. . . . Interest accrues daily based on the outstanding principal balance of your loan(s); therefore, future interest which has not yet accrued cannot be prepaid. In order to reduce the total interest you pay over the life of your loan(s), you should continue to remit payments while in a paid-ahead status. [*Id.*].

44. Pineda has testified that he has no complaint about how Sallie Mae set the first payment due date on his Consolidation Loan. Exh. 10 (Pineda Dep.) at 47:16-23.

45. Pineda has never been late in making a payment on his Consolidation Loan, and has never been charged "extra" interest for making a payment after its scheduled due date. *Id.* at 81:20-82:1, 108:20-109:3, 111:24-114:7.

46. Sallie Mae has never charged Pineda a late fee. *See* Exh. 45 (Excerpt from Plaintiff Carlos A. Pineda's Supplemental Responses to Defendant Sallie Mae, Inc.'s First Set of Interrogatories); Exh. 10

(Pineda Dep.) at 41:10-15, 42:12-17, 43:7-10, 44:13-45:11.

Plaintiff Hoon Koo's Loans

47. Plaintiff Hoon Koo had four Stafford Loans, which he obtained pursuant to Applications and Promissory Notes he signed on August 25, 1993, October 8, 1994, September 7, 1995 and October 27, 1996. Exh. 15-18; Exh. 3 (Koo Dep.) at 79:8-13, 81:17-23, 82:2-19, 88:12-25, 92:8-24.

48. Koo obtained his 1993 and 1994 Stafford Loans from Wells Fargo and his 1995 and 1996 Stafford Loans from COLLEGECRED/TIAA/TRU. Exh. 15-18.

49. Koo's 1993 Stafford Loan Application and Promissory Note stated, in part:

> I agree to pay an amount equivalent to simple interest . . . on the unpaid principal balance from the date of disbursement until the entire principal sum and accrued interest are paid in full, (2) however, the U.S. Secretary of Education ("Secretary") will pay the interest that accrues on this loan prior to repayment status and during any deferment, if it is determined that I qualify to have such payments made on my behalf under the regulations governing the Guaranteed Student Loan Program.

* * *

> If permitted by state law, my lender may collect from me a late charge if I fail to pay all or part of a required installment payment within 10 days after it is due. . . . A late charge may not exceed 6 percent of each late installment.

Exh. 15.

50. Koo's 1994, 1995 and 1996 Stafford Loan Applications and Promissory Notes each stated, in part:

> Interest accrues on the unpaid principal balance of each loan from the date of disbursement by the lender until the entire principal balance is paid in full. I agree to pay all interest charges on my unsubsidized Federal Stafford Loan. I agree to pay all interest charges on my subsidized Federal Stafford Loan except interest payable by the federal government under the Act.
>
> * * *
>
> If I fail to make any part of an installment payment within 10 days after it becomes due, the holder may collect from me a late charge not to exceed 6% of each late installment.

Exh. 16-18.

51. Koo does not know whether he read any of his Stafford Loan applications and promissory notes before he signed them. Exh. 3 (Koo Dep.) at 84:3-85:15, 89:1-22, 90:22-91:2, 92:25-93:19.

52. Koo's Stafford Loans were all subsidized loans. Exh. 7; Exh. 46 (Letter to Hoon Koo, dated March 31, 1998); Exh. 3 (Koo Dep.) at 12:1-8.

53. Because Koo's Stafford Loans were subsidized loans, he did not have to pay any interest that accrued on them while he was still in school. Exh. 3 (Koo Dep.) at 12:9-14.

54. Because Koo's Stafford Loans were subsidized loans, he also did not have to pay any interest that accrued on them during the six-month grace period following his graduation from school. Exh. 15-18.

55. Plaintiff Koo's grace period on his Stafford Loans ended in March 1998, and his first payment date was scheduled for April 21, 1998. Exh. 7.

56. Before his grace period ended, and before he became responsible for paying any interest on his Stafford Loans, Koo was sent payment schedules which stated, in part:

> Interest on your loans accrues on a daily, simple interest basis.
>
> * * *
>
> [The estimate of accrued interest to be paid on his loans] assumes payments are made as scheduled.
>
> * * *
>
> You may be charged a late fee, not to exceed 6% of the installment amount due on your

> loan(s), if you fail to make your payment within 15 days after it is due.

Exh. 4-7.

57. From August 21, 1998 until he finished paying the loans, Plaintiff Koo made his Stafford Loan payments through a Direct Repay program that automatically transferred his monthly loan payment from his bank account to Sallie Mae's account on the day the loan payment was due. Exh. 47 (Letter to Hoon Koo, dated July 22, 1998); Exh. 3 (Koo Dep.) at 42:4-14.

58. Before he started making payments on his Stafford Loans in 1998, Plaintiff Koo was aware that he could be charged a late fee if he failed to make a payment within fifteen days of its scheduled due date. *Id.* at 23:8-14, 26:14-20, 29:2-14, 34:6-18.

59. Sallie Mae never charged Koo a late fee. *Id.* at 11:18-25, 64:11-14, 143:20-25.

II. CONCLUSIONS OF LAW

A. SUMMARY JUDGMENT STANDARD

1. Summary judgment must be granted if the papers show that "there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Lindsey v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065, 1068 (9th Cir. 1999). It is the moving

party's burden to establish that there exists no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978). Once the moving party demonstrates the absence of a genuine issue of material fact, the nonmoving party must come forward with admissible evidence creating a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

B. LENDING PRACTICES AT ISSUE

Daily Simple Interest Is Required By The DOE

2. All of the loans at issue in this case are regulated by DOE, which is statutorily authorized and required to regulate the Federal Family Education Loan Program ("FFELP"). *See* 20 U.S.C. § 1082(a).

3. In addition to regulating FFELP Loans, DOE is statutorily authorized and required to make student loans under the Direct Loan Program. 20 U.S.C. §§ 1087a, 1087b. By statute, the Stafford, PLUS and Consolidation Loans that DOE makes under the Direct Loan Program must have "the same terms, conditions, and benefits" as the Stafford, Consolidation and PLUS Loans issued under FFELP. 20 U.S.C. § 1087e(a)(1).

4. The Higher Education Act ("HEA") requires DOE to "prescribe common application forms and promissory notes, or master promissory notes, to be used for applying for [FFELP] loans." 20 U.S.C. § 1082(m)(1). Pursuant to this statutory mandate, DOE has issued regulations which require lenders and loan guarantee agencies to use federally approved loan application forms and promissory notes. *See* 34 C.F.R. § 682.401(d)(3) ("The guaranty agency must use common application forms, promissory notes, Master Promissory Notes (MPN), and other common forms approved by the Secretary.").

5. The HEA and DOE's regulations also prescribe the contents of disclosure statements that lenders must provide to student loan borrowers. 20 U.S.C. § 1083; 34 C.F.R. § 682.205. The HEA states that disclosure statements must inform borrowers of "the projected total of interest charges which the borrower will pay on the loan or loans, *assuming that the borrower makes payments exactly in accordance with the repayment schedule*." 20 U.S.C. § 1083(b)(8) (emphasis added). DOE's regulations similarly state that lenders must inform borrowers of "[t]he estimated total amount of interest to be paid on the loan, *assuming that payments are made in accordance with the repayment schedule*." 34 C.F.R. § 682.205(c)(2)(viii) (emphasis added).

6. Stafford loans can be either subsidized or unsubsidized. 20 U.S.C. §§ 1078, 1078-8. When loans are subsidized, the federal government is responsible for paying the interest that accrues while the

borrower is in school on at least a half-time basis, during a six-month grace period immediately following the date the borrower stops attending school on at least a half-time basis, and during certain other authorized periods of deferment. 20 U.S.C. § 1078; 34 C.F.R. § 682.210(a). When the federal government is paying interest on behalf of a FFELP loan borrower, DOE's regulations require the government to pay the lender daily interest on the loans. *See* 34 C.F.R. § 682.304.

7. Pursuant to its statutory authority, the DOE provides borrowers and lenders with information about student loans through its web sites. Through its web sites, DOE has informed borrowers and lenders that daily simple interest is charged on all student loans, including all student loans made under the FFELP and all student loans made under the Direct Loan Program. DOE's web site provides the following explanation of how interest must be calculated on all student loans regulated by the agency:

> *Interest on all loans borrowed under [Department of Education] programs is calculated on a simple daily basis.* The following formula demonstrates how the simple interest is calculated between payments:
>
> Average daily balance between payments
>
> x Interest Rate
>
> x (Number of days between payments/365.25)

How interest accrues between payments made on April 15 and May 15, for example:

Average daily balance:	$10,000
Interest rate:	x .08
Days between payments (30/365.25):	x .08214
Monthly Interest:	$65.71

The loan holder first applies your payment to late charges or collection costs on your account (if any), then to the interest that has accumulated (accrued interest). The remainder of the payment is then applied to the principal balance. *Just as the accrued interest varies monthly (depending on how many days elapse between the receipt of payments)*, the amount of a payment applied to accrued interest and the amount applied to principal also will vary monthly.

See DEPARTMENT OF EDUCATION, REPAYING YOUR STUDENT LOANS 4-5, *available at* http://studentaid.ed.gov/students/attachments/siteresources/RepayingYourStudentLoansEnglish2003_04.pdf (emphasis added) (last visited May 9, 2008).

8. DOE's web site also provides the following explanation of how interest is calculated on all federally guaranteed student loans:

How can I calculate the amount of interest on my own?

To determine the amount of interest you will be required to pay on [sic] each month, use the following formula called the Simple Daily Interest formula:

Simple Daily Interest Formula

Number of days since last payment

X

Principal Balance Outstanding

X

Interest Rate Factor

=

Interest Amount

Practice Example: Let's say the remaining balance on your loan is $9500.00. You sent in a payment of $160.00, 32 days after your previous month's payment. Your interest rate is 8.25% (interest rate factor is .00022587).

32 (days) X $9500.00 (PBO) X .00022587 (interest rate factor)

You would pay $68.66 toward interest and $91.34 toward the principal balance. This would leave you with a loan balance of $9408.66 after the $160.00 payment was applied.

Interest Rate Factor

The interest rate factor is used to calculate the amount of interest that accrues on your loan. It is determined by dividing your loan's interest rate by 365.25 (the number of days in a year). See the following table to see some examples of interest rate factors.

Interest Rate	Converted To Decimals	Divide By 365.25	Interest Rate Factor
8.99%	.0899	.0899/365.25	.00024613
8.25%	.0825	.0825/365.25	.00022587
7.59%	.0759	.0759/365.25	.00020780

Why does the amount of interest I pay vary from month to month?

Interest accrues on a daily basis on your loans. Factors such as: the number of days between your last payment, the interest rate, and the amount of your loan balance, determine the amount of interest that accrues each month.

You can calculate how much will accrue on your loan by using the Simple Daily Interest Formula.

See http://studentaid.ed.gov/PORTALSWebApp/students/english/repaying.jsp (last visited May 9, 2008).

9. Consistent with its statutory obligation to use the same terms for Direct Loans that are used in FFELP Loans, DOE's web site for Direct Loans

similarly explains to borrowers that daily simple interest is charged on all of the student loans it makes under the Direct Loan Program. The website states:

> **Why does the amount of interest I pay vary from month to month?**
>
> Interest accrues on a daily basis on your loans. Factors such as: the number of days between your last payment, the interest rate, and the amount of your loan balance, determine the amount of interest that accrues each month. You can calculate how much will accrue on your loan by using the Simple Daily Interest Formula.
>
> **How can I calculate the amount of interest on my own?**
>
> To determine the amount of interest you will be required to pay on [sic] each month, use the following formula called the Simple Daily Interest formula:
>
> **Simple Daily Interest Formula**
>
> Number of days since last payment
>
> X
>
> Principal Balance Outstanding
>
> X
>
> Interest Rate Factor
>
> =
>
> Interest Amount

> **Practice Example:** Let's say the remaining balance on your loan is $9500.00. You sent in a payment of $160.00, 32 days after your previous month's payment. Your interest rate is 8.25% (interest rate factor is .00022587).
>
> 32 (days) X $9500.00 (PBO) X .00022587 (interest rate factor)
>
> You would pay $68.66 toward interest and $91.34 toward the principal balance. This would leave you with a loan balance of $9408.66 after the $160.00 payment was applied.

See https://www.dlssonline.com/borrower/QctrHelpPage.do?cmd=initializeContext&APageID=QctrCintA007 (last visited May 9, 2008); and https://www.dlssonline.com/borrower/QctrHelpPage.do?cmd=initializeContext&APageID=QctrCintA002 (last visited May 9, 2008).

Pursuant to its statutory mandate under 20 U.S.C. § 1082(m), the DOE has issued a standard Loan Verification Certificate ("LVC") that all lenders must use when obtaining loan pay-off information from other lenders for purposes of replacing existing FFELP Loans with a Consolidation Loans. *See* Federal Consolidation Loan Verification Certificate, *available at* http://www.ifap.ed.gov/dpcletters/attachments/FP0705AttECORRECTEDLVC.pdf.

This DOE-mandated LVC requires the owners of existing FFELP loans to calculate, and the Consolidating Lender to pay, the accrued, daily simple

interest on the loans being replaced with a Consolidation Loan. *Id.*

10. DOE's regulatory scheme authorizes and requires lenders and loan servicers to charge daily simple interest on FFELP Loans.

11. Nothing in the HEA or DOE's regulations prohibits Sallie Mae from charging daily simple interest on FFELP Loans.

12. No statute, regulation or other legal authority requires Sallie Mae to charge interest pursuant to the pre-computed approach plaintiffs advocate.

Allowing Consolidation And PLUS Loan Borrowers 60 Days To Make Their First Payment Is Authorized By The DOE

13. On Consolidation and PLUS Loans, DOE's required promissory notes state that interest accrues from the date loan funds are disbursed and permit lenders to set the first payment due date up to 60 days after disbursement.

14. The HEA states that "Repayment of principal on [PLUS] loans . . . shall commence not later than 60 days after the date such loan is disbursed by the lender. . . ." 20 U.S.C. § 1078-2(d)(1)(A)(i).

15. "Repayment of a consolidation loan shall commence within 60 days after all holders have . . . discharged the liability of the borrower on the loans selected for consolidation." 20 U.S.C. § 1078-3(c)(4).

16. DOE regulations also mandate that the first payment is due within 60 days after the date the loan is disbursed. 34 C.F.R. § 682.209(a).

17. Nothing in the HEA or DOE's regulations prohibits Sallie Mae from charging interest from the date of loan disbursement or from setting first payment dates on Consolidation and PLUS Loans up to 60 days after disbursement.

18. No statute, regulation or other legal authority requires Sallie Mae to set first payment dates on Consolidation and PLUS Loans less than 60 days after the loan funds are disbursed.

Late Fees Are Permitted By Federal Law

19. DOE's regulations authorize lenders to charge late fees for loan payments that are made more than fifteen days after their scheduled due dates. 34 C.F.R. § 682.202(f)(1) ("If authorized by the borrower's promissory note, the lender may require the borrower to pay a late charge. . . . This charge may not exceed six cents for each dollar of each late installment.")

20. DOE's regulations also permit lenders to apply loan payments to any late charges that may be due, before applying the balance of the payment to the interest that has accrued on the loan. 34 C.F.R. § 682.209(b)(1) ("The lender may credit the entire payment amount first to *any late charges* accrued or collection costs and then to *any outstanding interest*

and then to outstanding principal.") (emphasis added).

21. DOE's publications confirm that late payments can lead to both late fees and the additional accrual of interest. REPAYING YOUR STUDENT LOANS states "If you're delinquent, excess interest will accrue. You might also have collection charges or late fees." REPAYING YOUR STUDENT LOANS at 31.

22. Sallie Mae's practice of charging late fees for loan payments that are more than 15 days after their scheduled due dates is authorized by DOE regulation and by the promissory notes signed by FFELP Loan borrowers.

23. No statute, regulation or other legal authority prohibits Sallie Mae from assessing late fees for loan payments that are made more than 15 days after their scheduled due dates.

24. Cal. Civ. Code § 1671 has no relevance to Plaintiffs' claims. That section is "not applicable where the validity of the liquidated damages provision is governed by federal law or a regulation adopted pursuant thereto." *See* Cal. Civ. Code 1671(a) and Law Revision Commission Comments to Cal. Civ. Code § 1671.

C. PLAINTIFFS CANNOT MAINTAIN AN ACTION FOR ANY ALLEGED DEFICIENCIES IN THE DISCLOSURE OF THEIR LOAN TERMS

25. The HEA specifically exempts FFELP Loans from any disclosure requirements that might exist under state law. 20 U.S.C. § 1098g ("Loans made, insured, or guaranteed pursuant to a program authorized by this subchapter shall not be subject to any disclosure requirements of any State law.")

26. The HEA precludes FFELP Loan borrowers from seeking damages for a lender's or loan servicer's failure to comply with the HEA's disclosure requirements. 20 U.S.C. § 1083(c)(2).

27. As a matter of law, Plaintiffs may not maintain an action against Sallie Mae for alleged deficiencies in the language of loan applications, promissory notes, disclosure statements, payment schedules or billing statements relating to FFELP Loans.

D. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON EACH CAUSE OF ACTION

Cal. Bus. & Prof. Code § 17200, *et seq.*

28. The Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*, prohibits "any unlawful, unfair or fraudulent business act. . . ." Section 17204 of the Cal. Bus. & Prof. Code states that "[a]ctions for any relief pursuant to this chapter shall

be prosecuted exclusively . . . by any person who has suffered injury in fact and has lost money or property as a result of [such] unfair competition."

29. A person seeking to assert a claim under the UCL must show that (1) she has suffered actual injury in fact, and (2) such injury occurred as a result of the defendant's alleged violation of the UCL. *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005).

30. Under California law, a plaintiff cannot assert a UCL claim if the challenged practice is authorized by federal or state law. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 182, 83 Cal. Rptr. 2d 548, 562 (Cal. 1999). *See also Williams v. Washington Mut. Bank*, No. CIV 07-2418 WBS GGH, 2008 WL 115097, *4 (E.D. Cal. Jan. 11, 2008) (increasing APR in the event of a default if notice was initially provided in disclosures was permissible under federal law and could not be the basis of a UCL action); *Augustine v. FIA Card Servs., N.A.*, 485 F. Supp. 2d 1172, 1176 (E.D. Cal. 2007) (holding that a section 17200 claim was barred where defendants' actions complied with federal regulations governing disclosures); *Byars v. SCME Mortgage Bankers, Inc.*, 109 Cal. App. 4th 1134, 1147-48, 135 Cal. Rptr. 2d 796, 805 (Cal. Ct. App. 2003) (where particular "conduct has been deemed lawful," it cannot provide the basis for a section 17200 cause of action).

31. The three practices being challenged in this case are all authorized by DOE's regulatory scheme,

and cannot be considered "unlawful, unfair or fraudulent" within the meaning of the UCL.

Breach of Contract

32. Under California law, the elements of breach of contract are 1) the existence of a contract, 2) the plaintiff's performance or excuse for nonperformance, 3) the defendant's breach, and 4) injury to the plaintiff therefrom. *Careau & Co. v. Security Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1388, 272 Cal. Rptr. 387, 395 (Cal. Ct. App. 1990).

33. The loan applications and promissory notes at issue in this case, and the disclosures that were incorporated into those documents by reference, stated that Sallie Mae would or could employ the three practices that Plaintiffs are challenging.

34. No provision in the contracts at issue prohibited Sallie Mae from charging daily simple interest from changing late fees, from charging late fees, or from setting first payment dates up to 60 days after disbursement.

Breach of Implied Covenant of Good Faith and Fair Dealing

35. A plaintiff asserting a claim for breach of the implied covenant of good faith and fair dealing must establish the following elements: (1) the existence of a contract; (2) the plaintiff did all, or substantially all of the significant things the contract

required; (3) the conditions required for the defendant's performance had occurred; (4) the defendant unfairly interfered with the plaintiffs right to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant's conduct. *Marks v. Chicoine,* No. C 06-06806 SI, 2007 WL 1056779, at *5 (N.D. Cal. April 6, 2007) (quoting *Garey/Philadelphia, Ltd. v. Yoshinoya West, Inc.,* 2006 LEXIS 11533, at *1, *11-12 (Cal. Ct. App. Dec. 21, 2006)).

36. There is no reported decision in which a California court has held that the covenant of good faith and fair dealing prohibits a contracting party from doing what is permitted by contract. *See, e.g., Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.,* 2 Cal. 4th 342, 374, 6 Cal. Rptr. 2d 467, 485 (Cal. 1992).

37. The FFELP loan documents at issue in this case permitted Sallie Mae to employ the three loan servicing practices that are being challenged. By employing those practices, Sallie Mae did not breach any duty of good faith and fair dealing so plaintiffs cannot recover on their claim for breach of implied covenant of good faith and fair dealing.

Consumer Legal Remedies Act

38. The right to bring a private cause of action under the Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.* ("CLRA") is limited to consumers who suffer "damage as a result of the use or employment by any person of a method, act, or practice

declared to be unlawful by [California Civil Code] Section 1770." Cal. Civ. Code § 1780. The elements of a claim under the CLRA are: (1) that the defendant engaged in a prohibited practice; (2) the complained of conduct occurred in the context of a transaction resulting in the sale or lease of goods or services; and (3) damage to the consumer as a result of the alleged conduct. *See* Cal. Civ. Code § 1770(a).

39. A plaintiff may not bring a claim for damages under the CLRA unless he has complied with the notice requirement of Cal. Civ. Code § 1782(a). *See, e.g. Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1195-96 (S.D. Cal. 2005) (dismissing with prejudice a claim for damages under the CLRA where plaintiffs failed to comply with notice provisions). Section 1782(a) states:

> Thirty days or more prior to the commencement of an action for damages pursuant to this title, the consumer shall do the following: (1) Notify the person alleged to have employed or committed methods, acts, or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770. (2) Demand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of Section 1770. The notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred or to the person's principal place of business within California.

40. Where a challenged practice is set forth, it cannot form the basis of a claim under the CLRA. *See Augustine v. FIA Card Services, N.A.*, 485 F. Supp. 2d 1172, 1174-75 (E.D. Cal. 2007) (holding that CLRA claim was barred where defendants' actions were fully disclosed); *Van Slyke v. Capital One Bank*, No. C 07-00671 WHA, 2007 WL 3435095, *5 (N.D. Cal. Nov. 13, 2007) (denying leave to amend complaint where summary judgment had already been granted on unfair and deceptive practices claim because the interest practice challenged was fully disclosed); *Evans v. Chase Manhattan Bank USA, N.A.*, No. C-05-3968 SC, 2006 WL 213740, *6 (N.D. Cal. Jan. 27, 2006) (dismissing Plaintiffs CLRA claim for unfair or deceptive acts where bank was acting under the fully-disclosed terms of the contract).

41. In this case, plaintiffs did not provide the written notice required by Cal. Civ. Code § 1782(a). Thus, as a matter of law, plaintiffs may not assert a claim for damages under the CLRA.

42. Through the loan applications, promissory notes, disclosure statements, and payment schedules, Sallie Mae set forth the three practices that plaintiffs are challenging. Thus, as a matter of law, those practices may not form the basis for a claim under the CLRA.

Unjust Enrichment

43. There is no cause of action in California for unjust enrichment. *See, e.g., Yoo v. Wendy's*

International, Inc., No. 07-cv-4515-FMC-JCx at 12 (C.D. Cal. Dec. 5, 2007) (holding there is no action for unjust enrichment in California); *Roots Ready Made Garments v. Gap, Inc.*, No. C 07-03363 CRB, 2008 WL 239254, *8 (N.D. Cal. Jan. 28, 2008) ("[t]here is no cause of action for unjust enrichment"); *Enreach Tech., Inc. v. Embedded Internet Solutions, Inc.*, 403 F. Supp. 2d 968, 976 (N.D. Cal. 2005) ("unjust enrichment is not a valid cause of action in California"); *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 794, 131 Cal. Rptr. 2d 347, 357 (Cal. Ct. App. 2003) ("The phrase 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so.").

44. An action for unjust enrichment does not lie where express binding agreements exist and define the parties' rights. *California Med. Assn, Inc. v. Aetna U.S. Healthcare of Cal., Inc.*, 94 Cal. App. 4th 151, 172, 114 Cal. Rptr. 2d 109, 125 (Cal. Ct. App. 2001).

45. The parties' rights in this case are defined in the loan documents, which are express binding agreements. Thus, as a matter of law, plaintiffs may not maintain a cause of action for unjust enrichment.

E. PLAINTIFFS' CLAIMS ARE PREEMPTED BY FEDERAL LAW

46. Federal preemption can be expressed or implied. *See Armstrong v. Accrediting Council For Continuing Educ. & Training, Inc.*, 168 F.3d 1362, 1369

(D.C. Cir. 1999). Implied preemption may arise in the form of conflict preemption, which occurs when compliance with both federal and state law is a physical impossibility *or* where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Crosby v. Nat. Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

47. Courts have found conflict preemption in other cases involving the HEA. *See Armstrong*, 168 F.3d at 1369 (affirming dismissal of contract claims where an "actual conflict" existed between plaintiff's "contract claims and [HEA] regulations"); *see also Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1264-66 (9th Cir. 1996) (affirming grant of summary judgment on the basis of implied preemption where the remedies sought under Oregon law were in actual conflict with the HEA and would frustrate congressional intent to apply uniform rules).

48. "The conflict [between federal and state law] does not evaporate because the Board's regulation simply *permits*, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts." *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 155 (1982) (emphasis added); *see also Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 886 (2000) (affirming dismissal of state law action where allowing state court jury to find car manufacturer liable for failing to install air bag would create irreconcilable conflict with federal regulation giving manufacturers choice about installing

air bags and "would stand as an 'obstacle' to the accomplishment of [the federal] objective").

49. Sallie Mae cannot simultaneously comply with plaintiffs' view of California law and comply with federal law. Moreover, contrary state causes of action or theories such as those proffered by plaintiffs that seek to limit or undermine the framework designed by Congress and the DOE can only be characterized as risking the creation of irreconcilable conflict and the imposition of obstacles to the accomplishment and execution of the full purposes and objectives of the HEA. For all of these reasons, plaintiffs' claims are preempted by federal law.

Dated: ~~May~~ June 16, 2008

/s/ Real
The Honorable
Manuel L. Real
UNITED STATES
DISTRICT COURT
JUDGE

[The Court has reviewed the submitted uncontroverted facts and conclusions of law and adopts them as true and correct.

/s/ Real]

Respectfully submitted,

/s/ William E. Potts

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANN CHAE, et al., Plaintiffs, v. SLM CORPORATION, et al., Defendants, and UNITED STATES OF AMERICA Intervenor-Plaintiff.	Case No. CV07-02319 R (RCx) ORDER REGARDING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Assigned to the Hon. Manuel L. Real Hearing Date: June 2, 2008 Time: 10:00 a.m. Location: Courtroom 8

Upon a review of the Defendants' Motion for Summary Judgment, and good cause appearing thereon, it is hereby

ORDERED, that the Defendants' Motion for Summary Judgment is granted in all respects and ORDERED, that judgment is granted to Defendants on all counts of the Amended Complaint.

Dated: June 16, 2008

/s/ Real
The Honorable Manuel L. Real
United States District
Court Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANN CHAE, Individually and On Behalf of All Others Similarly Situated; WILLIAM COAKLEY, Individually and On Behalf of All Others Similarly Situated; HOON KOO, Individually and On Behalf of All Others Similarly Situated; CARLOS A. PINEDA, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs-Appellants,

v.

SLM CORPORATION, DBA Sallie Mae; SALLIE MAE SERVICING CORPORATION; SALLIE MAE, INC.,

Defendants-Appellees,

and

UNITED STATES OF AMERICA,

Plaintiff-intervenor-Appellee.

No. 08-56154

D.C. No. 2:07-cv-02319-R-RC
Central District of California, Los Angeles

ORDER

(Filed Apr 01, 2010)

Before: GOULD and BEA, Circuit Judges, and HART, District Judge.*

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.

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* The Honorable William T. Hart, Senior District Judge for the Northern District of Illinois, sitting by designation.

U.S. Constitution, Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

20 U.S.C. § 1082. Legal powers and responsibilities

(a) General powers

In the performance of, and with respect to, the functions, powers, and duties, vested in him by this part, the Secretary may –

(1) prescribe such regulations as may be necessary to carry out the purposes of this part, including regulations applicable to third party servicers (including regulations concerning financial responsibility standards for, and the assessment of liabilities for program violations against, such servicers) to establish minimum standards with respect to sound management and accountability of programs under this part, except that in no case shall damages be assessed against the United States for the actions or inactions of such servicers;

(2) sue and be sued in any court of record of a State having general jurisdiction or in any district court of the United States, and such district courts shall have jurisdiction of civil actions arising under this part without regard to the amount in controversy, and action instituted under this subsection by or against the Secretary shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in that office; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Secretary or property under the Secretary's control and nothing herein shall be construed

to except litigation arising out of activities under this part from the application of sections 509, 517, 547, and 2679 of Title 28;

(3) include in any contract for Federal loan insurance such terms, conditions, and covenants relating to repayment of principal and payment of interest, relating to the Secretary's obligations and rights to those of eligible lenders, and borrowers in case of default, and relating to such other matters as the Secretary determines to be necessary to assure that the purposes of this part will be achieved; and any term, condition, and covenant made pursuant to this paragraph or pursuant to any other provision of this part may be modified by the Secretary, after notice and opportunity for a hearing, if the Secretary finds that the modification is necessary to protect the United States from the risk of unreasonable loss;

(4) subject to the specific limitations in this part, consent to modification, with respect to rate of interest, time of payment of any installment of principal and interest or any portion thereof, or any other provision of any note or other instrument evidencing a loan which has been insured by the Secretary under this part;

(5) enforce, pay, or compromise, any claim on, or arising because of, any such insurance or any guaranty agreement under section 1078(c) of this title; and

(6) enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption.

* * *

(l) Uniform administrative and claims procedures

(1) In general

The Secretary shall, by regulation developed in consultation with guaranty agencies, lenders, institutions of higher education, secondary markets, students, third party servicers and other organizations involved in providing loans under this part, prescribe standardized forms and procedures regarding –

(A) origination of loans;

(B) electronic funds transfer;

(C) guaranty of loans;

(D) deferments;

(E) forbearance;

(F) servicing;

(G) claims filing;

(H) borrower status change and anticipated graduation date; and

(I) cures.

(2) Special rules

(A) The forms and procedures described in paragraph (1) shall include all aspects of the loan process as such process involves eligible lenders and guaranty agencies and shall be designed to minimize administrative costs and burdens (other than the costs and burdens involved in the transition to new forms and procedures) involved in exchanges of data to and from borrowers, schools, lenders, secondary markets, and the Department.

(B) Nothing in this paragraph shall be construed to limit the development of electronic forms and procedures.

(3) Simplification requirements

Such regulations shall include –

(A) standardization of computer formats, forms design, and guaranty agency procedures relating to the origination, servicing, and collection of loans made under this part;

(B) authorization of alternate means of document retention, including the use of microfilm, microfiche, laser disc, compact disc, and other methods allowing the production of a facsimile of the original documents;

(C) authorization of the use of computer or similar electronic methods of maintaining records relating to the performance of servicing, collection,

and other regulatory requirements under this chapter; and

(D) authorization and implementation of electronic data linkages for the exchange of information to and from lenders, guarantors, institutions of higher education, third party servicers, and the Department of Education for student status confirmation reports, claim filing, interest and special allowance billing, deferment processing, and all other administrative steps relating to loans made pursuant to this part where using electronic data linkage is feasible.

(4) Additional recommendations

The Secretary shall review regulations prescribed pursuant to paragraph (1) and seek additional recommendations from guaranty agencies, lenders, institutions of higher education, students, secondary markets, third party servicers and other organizations involved in providing loans under this part, not less frequently than annually, for additional methods of simplifying and standardizing the administration of the programs authorized by this part.

(m) Common forms and formats

(1) Common guaranteed student loan application form and promissory note

(A) In general

The Secretary, in cooperation with representatives of guaranty agencies, eligible lenders,

and organizations involved in student financial assistance, shall prescribe common application forms and promissory notes, or master promissory notes, to be used for applying for loans under this part.

(B) Requirements

The forms prescribed by the Secretary shall –

(i) use clear, concise, and simple language to facilitate understanding of loan terms and conditions by applicants; and

(ii) be formatted to require the applicant to clearly indicate a choice of lender.

(C) Free application form

For academic year 1999-2000 and succeeding academic years, the Secretary shall prescribe the form developed under section 1090 of this title as the application form under this part, other than for loans under sections 1078-2 and 1078-3 of this title.

(D) Master promissory note

(i) In general

The Secretary shall develop and require the use of master promissory note forms for loans made under this part and part C of this subchapter. Such forms shall be available for periods of enrollment beginning not later than July 1, 2000. Each form shall allow eligible borrowers to receive, in addition to initial loans, additional loans for the same

or subsequent periods of enrollment through a student confirmation process approved by the Secretary. Such forms shall be used for loans made under this part or part C of this subchapter as directed by the Secretary. Unless otherwise notified by the Secretary, each institution of higher education that participates in the program under this part or part C of this subchapter may use a master promissory note for loans under this part and part C of this subchapter.

(ii) Consultation

In developing the master promissory note under this subsection, the Secretary shall consult with representatives of guaranty agencies, eligible lenders, institutions of higher education, students, and organizations involved in student financial assistance.

(iii) Sale; assignment; enforceability

Notwithstanding any other provision of law, each loan made under a master promissory note under this subsection may be sold or assigned independently of any other loan made under the same promissory note and each such loan shall be separately enforceable in all Federal and State courts on the basis of an original or copy of the master promissory note in accordance with the terms of the master promissory note.

* * *

(2) Common deferment form

The Secretary, in cooperation with representatives of guaranty agencies, institutions of higher education, and lenders involved in loans made under this part, shall prescribe a common deferment reporting form to be used for the processing of deferments of loans made under this subchapter and part C of subchapter I of chapter 34 of Title 42.

(3) Common reporting formats

The Secretary shall promulgate standards including necessary rules, regulations (including the definitions of all relevant terms), and procedures so as to require all lenders and guaranty agencies to report information on all aspects of loans made under this part in uniform formats, so as to permit the direct comparison of data submitted by individual lenders, servicers, or guaranty agencies.

(4) Electronic forms

Nothing in this section shall be construed to limit the development and use of electronic forms and procedures.

* * *

20 U.S.C. § 1098g. Exemption from State disclosure requirements

Loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070 et seq.) [and 42 U.S.C.A. § 2751 et seq.] shall not be subject to any disclosure requirements of any State law.

California Business and Professions Code, § 17200. Unfair competition; prohibited activities

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

California Civil Code, § 1671. Validity; standards for determination; applicability of section

(a) This section does not apply in any case where another statute expressly applicable to the contract prescribes the rules or standard for determining the validity of a provision in the contract liquidating the damages for the breach of the contract.

(b) Except as provided in subdivision (c), a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.

(c) The validity of a liquidated damages provision shall be determined under subdivision (d) and not under subdivision (b) where the liquidated damages are sought to be recovered from either:

(1) A party to a contract for the retail purchase, or rental, by such party of personal property or services, primarily for the party's personal, family, or household purposes; or

(2) A party to a lease of real property for use as a dwelling by the party or those dependent upon the party for support.

(d) In the cases described in subdivision (c), a provision in a contract liquidating damages for the breach of the contract is void except that the parties to such a contract may agree therein upon an amount

which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

34 C.F.R. § 682.202 Permissible charges by lenders to borrowers.

The charges that lenders may impose on borrowers, either directly or indirectly, are limited to the following:

* * *

(b) Capitalization.

(1) A lender may add accrued interest and unpaid insurance premiums to the borrower's unpaid principal balance in accordance with this section. This increase in the principal balance of a loan is called "capitalization."

(2) Except as provided in paragraph (b)(4) and (b)(5) of this section, a lender may capitalize interest payable by the borrower that has accrued –

(i) For the period from the date the first disbursement was made to the beginning date of the in-school period;

(ii) For the in-school or grace periods, or for a period needed to align repayment of an SLS with a Stafford loan, if capitalization is expressly authorized by the promissory note (or with the written consent of the borrower);

(iii) For a period of authorized deferment;

(iv) For a period of authorized forbearance; or

(v) For the period from the date the first installment payment was due until it was made.

(3) A lender may capitalize accrued interest under paragraphs (b)(2)(ii) through (iv) of this section no more frequently than quarterly. Capitalization is again permitted when repayment is required to begin or resume. A lender may capitalize accrued interest under paragraph (b)(2)(i) and (v) of this section only on the date repayment of principal is scheduled to begin.

(4)(i) For unsubsidized Stafford loans disbursed on or after October 7, 1998 and prior to July 1, 2000, the lender may capitalize the unpaid interest that accrues on the loan according to the requirements of section 428H(e)(2) of the Act.

(ii) For Stafford loans first disbursed on or after July 1, 2000, the lender may capitalize the unpaid interest –

(A) When the loan enters repayment;

(B) At the expiration of a period of authorized deferment;

(C) At the expiration of a period of authorized forbearance; and

(D) When the borrower defaults.

(5) For Consolidation loans, the lender may capitalize interest as provided in paragraphs (b)(2) and (b)(3) of this section, except that the lender may capitalize the unpaid interest for a period of authorized in-school deferment only at the expiration of the deferment.

(6) For any borrower in an in-school or grace period or the period needed to align repayment, deferment, or forbearance status, during which the Secretary does not pay interest benefits and for which the borrower has agreed to make payments of interest, the lender may capitalize past due interest provided that the lender has notified the borrower that the borrower's failure to resolve any delinquency constitutes the borrower's consent to capitalization of delinquent interest and all interest that will accrue through the remainder of that period.

* * *

(f) Late charge.

(1) If authorized by the borrower's promissory note, the lender may require the borrower to pay a late charge under the circumstances described in paragraph (f)(2) of this section. This charge may not exceed six cents for each dollar of each late installment.

(2) The lender may require the borrower to pay a late charge if the borrower fails to pay all or a portion of a required installment payment within 15 days after it is due.

(g) Collection charges.

(1) If provided for in the borrower's promissory note, and notwithstanding any provisions of State law, the lender may require that the borrower or any endorser pay costs incurred by the lender or its

agents in collecting installments not paid when due, including, but not limited to –

(i) Attorney's fees;

(ii) Court costs; and

(iii) Telegrams.

(2) The costs referred to in paragraph (g)(1) of this section may not include routine collection costs associated with preparing letters or notices or with making personal contacts with the borrower (e.g., local and long-distance telephone calls).

(h) Special allowance. Pursuant to § 682.412(c), a lender may charge a borrower the amount of special allowance paid by the Secretary on behalf of the borrower.

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34 C.F.R. § 682.205 Disclosure requirements for lenders.

(a) Initial disclosure statement.

(1) A lender must disclose the information described in paragraph (a)(2) of this section to a borrower, in simple and understandable terms, before or at the time of the first disbursement on a Federal Stafford or Federal PLUS loan. The information given to the borrower must prominently and clearly display, in bold type, a clear and concise statement that the borrower is receiving a loan that must be repaid.

(2) The lender shall provide the borrower with –

(i) The lender's name;

(ii) A toll-free telephone number accessible from within the United States that the borrower can use to obtain additional loan information;

(iii) The address to which correspondence with the lender and payments should be sent;

(iv) Notice that the lender may sell or transfer the loan to another party and, if it does, that the address and identity of the party to which correspondence and payments should be sent may change;

(v) The principal amount of the loan;

(vi) The amount of any charges, including the origination fee if applicable, and the insurance premium, to be collected by the lender before or at the time of each disbursement on the loan, and an explanation of whether those charges are to be deducted from the proceeds of the loan or paid separately by the borrower;

(vii) The actual interest rate;

(viii) The annual and aggregate maximum amounts that may be borrowed;

(ix) A statement that information concerning the loan, including the date of disbursement and the amount of the loan, will be reported to a national credit bureau;

(x) An explanation of when repayment of the loan is required and when the borrower is required to pay the interest that accrues on the loan;

(xi) The minimum and maximum number of years in which the loan must be repaid and the minimum amount of required annual payments;

(xii) An explanation of any special options the borrower may have for consolidating or refinancing the loan;

(xiii) A statement that the borrower has the right to prepay all or part of the loan at any time, without penalty;

(xiv) A statement describing the circumstances under which repayment of the loan or interest that accrues on the loan may be deferred;

(xv) A statement of availability of the Department of Defense program for repayment of loans on the basis of military service, as provided for in 10 U.S.C. 2171;

(xvi) The definition of "default" found in § 682.200, and the consequences to the borrower of a default, including a statement concerning likely litigation, a statement that the default will be reported to a national credit bureau, and statements that the borrower will be liable for substantial collection costs, that the borrower's Federal and State income tax refund may be withheld to pay the debt, that the borrower's wages may be garnished or offset, and that the borrower will be ineligible for additional Federal

student financial aid, as well as for assistance under most Federal benefit programs;

(xvii) An explanation of the possible effects of accepting the loan on the student's eligibility for other forms of student financial assistance;

(xviii) An explanation of any costs the borrower may incur in the making or collection of the loan; and

(xix) In the case of a Stafford or student PLUS loan, a statement that the loan proceeds will be transmitted to the school for delivery to the borrower;

(xx) A statement of the total cumulative balance, including the loan applied for, owed to that lender, and an estimate of, or information that will allow the borrower to estimate, the projected monthly payment amount based on that cumulative outstanding balance.

(3) With the exception of paragraphs (a)(2)(i) through (a)(2)(iii), (a)(2)(v) through (a)(2)(vii), and (a)(2)(xx) of this section, a lender's disclosure requirements are met if it provides the borrower with either –

(i) The borrower's rights and responsibilities statement approved by the Secretary under paragraph (b) of this section; or

(ii) The plain language disclosure approved by the Secretary under paragraph (g) of this section for subsequent loans made under a Master Promissory Note.

(b) Separate statement of borrower rights and responsibilities. In addition to the disclosures required by paragraph (a) of this section, the lender must provide the borrower with a separate written statement, using simple and understandable terms, at or prior to the time of the first disbursement, that summarizes the rights and responsibilities of the borrower with respect to the loan. The statement must also warn the borrower about the consequences described in paragraph (a)(2)(xvi) of this section if the borrower defaults on the loan. The Borrower's Rights and Responsibilities statement approved by the Secretary satisfies this requirement.

(c) Disclosure of repayment information.

(1) The lender must disclose the information described in paragraph (c)(2) of this section, in simple and understandable terms, in a statement provided to the borrower at or prior to the beginning of the repayment period. In the case of a Federal Stafford or Federal SLS loan, the disclosures required by this paragraph must be made not less than 30 days nor more than 240 days before the first payment on the loan is due from the borrower. If the borrower enters the repayment period without the lender's knowledge, the lender must provide the required disclosures to the borrower immediately upon discovering that the borrower has entered the repayment period.

(2) The lender shall provide the borrower with –

(i) The lender's name, a toll-free telephone number accessible from within the United States that

the borrower can use to obtain additional loan information, and the address to which correspondence with the lender and payments should be sent;

(ii) The scheduled date the repayment period is to begin;

(iii) The estimated balance, including the estimated amount of interest to be capitalized, owed by the borrower as of the date upon which the repayment period is to begin, or the date of the disclosure, whichever is later;

(iv) The actual interest rate on the loan;

(v) An explanation of any fees that may accrue or be charged to the borrower during the repayment period;

(vi) The borrower's repayment schedule, including the due date of the first installment and the number, amount, and frequency of payments;

(vii) Except in the case of a Consolidation loan, an explanation of any special options the borrower may have for consolidating or refinancing the loan and of the availability and terms of such other options;

(viii) The estimated total amount of interest to be paid on the loan, assuming that payments are made in accordance with the repayment schedule; and

(ix) A statement that the borrower has the right to prepay all or part of the loan at any time, without penalty.

(d) Exception to disclosure requirement. In the case of a Federal PLUS loan, the lender is not required to provide the information in paragraph (c)(2)(viii) of this section if the lender, instead of that disclosure, provides the borrower with sample projections of the monthly repayment amounts assuming different levels of borrowing and interest accruals resulting from capitalization of interest while the student is in school. Sample projections must disclose the cost to the borrower of principal and interest, interest only, and capitalized interest. The lender may rely on the PLUS promissory note and associated materials approved by the Secretary for purposes of complying with this section.

(e) Borrower may not be charged for disclosures. The lender must provide the information required by this section at no cost to the borrower.

(f) Method of disclosure. Any disclosure of information by a lender under this section may be through written or electronic means.

(g) Plain language disclosure. The plain language disclosure text, as approved by the Secretary, must be provided to a borrower in conjunction with subsequent loans taken under a previously signed Master Promissory Note. The requirements of paragraphs (a) and (b) of this section are satisfied for subsequent loans if the borrower is sent the plain language

disclosure text and an initial disclosure containing the information required by paragraphs (a)(2)(i) through (iii), (a)(2)(v), (a)(2)(vi), (a)(2)(vii), and (a)(2)(xx) of this section.

(h) Notice of availability of income-sensitive and income-based repayment options.

(1) At the time of offering a borrower a loan and at the time of offering a borrower repayment options, the lender must provide the borrower with a notice that informs the borrower of the availability of income-sensitive and, except for parent PLUS borrowers and Consolidation Loan borrowers whose Consolidation Loan paid off one or more parent PLUS Loans, income-based repayment plans. This information may be provided in a separate notice or as part of the other disclosures required by this section. The notice must inform the borrower –

(i) That the borrower is eligible for income-sensitive repayment and may be eligible for income-based repayment, including through loan consolidation;

(ii) Of the procedures by which the borrower can elect income-sensitive or income-based repayment; and

(iii) Of where and how the borrower may obtain more information concerning income-sensitive and income-based repayment plans.

(2) The promissory note and associated materials approved by the Secretary satisfy the loan

origination notice requirements provided for in paragraph (h)(1) of this section.

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34 C.F.R. § 682.209 Repayment of a loan.

(a) Conversion of a loan to repayment status.

(1) For a Consolidation loan, the repayment period begins on the date the loan is disbursed. The first payment is due within 60 days after the date the loan is disbursed.

(2)(i) For a PLUS loan, the repayment period begins on the date of the last disbursement made on the loan. Interest accrues and is due and payable from the date of the first disbursement of the loan. The first payment is due within 60 days after the date the loan is fully disbursed.

(ii) For an SLS loan, the repayment period begins on the date the loan is disbursed, or, if the loan is disbursed in multiple installments, on the date of the last disbursement of the loan. Interest accrues and is due and payable from the date of the first disbursement of the loan. Except as provided in paragraph (a)(2)(iii), (a)(2)(iv), and (a)(2)(v) of this section the first payment is due within 60 days after the date the loan is fully disbursed.

(iii) or an SLS borrower who has not yet entered repayment on a Stafford loan, the borrower may postpone payment, consistent with the grace period on the borrower's Stafford loan.

(iv) If the lender first learns after the fact that an SLS borrower has entered the repayment period, the repayment begins no later than 75 days after the date the lender learns that the borrower has entered the repayment period.

(v) The lender may establish a first payment due date that is no more than an additional 30 days beyond the period specified in paragraphs (a)(2)(ii)-(a)(2)(iv) of this section in order for the lender to comply with the required deadline contained in § 682.205(c)(1).

* * *

(3)(ii) The first payment on a Stafford loan is due on a date established by the lender that is no more than –

(A) 60 days following the first day that the repayment period begins;

(B) 60 days from the expiration of a deferment or forbearance period;

(C) 60 days following the end of the post deferment grace period;

(D) If the lender first learns after the fact that the borrower has entered the repayment period, no later than 75 days after the date the lender learns that the borrower has entered the repayment period; or

(E) An additional 30 days beyond the period specified in paragraphs (a)(3)(ii)(A)-(a)(3)(ii)(D)

of this section in order for the lender to comply with the required deadlines contained in § 682.205(c)(1).

(v) The lender shall require the borrower to repay the loan under a standard repayment schedule described in paragraph (a)(6)(vi) of this section if the borrower –

(A) Does not select an income-sensitive, income-based, graduated, or, if applicable, an extended repayment schedule within 45 days after being notified by the lender to choose a repayment schedule;

(B) Chooses an income-sensitive repayment schedule, but does not provide the documentation requested by the lender under paragraph (a)(6)(viii)(C) of this section within the time period specified by the lender; or

(C) Chooses an income-based repayment schedule, but does not provide the income documentation requested by the lender under § 682.215(e)(1)(i) within the time period specified by the lender.

(vi) Under a standard repayment schedule, the borrower is scheduled to pay either –

(A) The same amount for each installment payment made during the repayment period, except that the borrower's final payment may be slightly more or less than the other payments; or

(B) An installment amount that will be adjusted to reflect annual changes in the loan's variable interest rate.

* * *

(h) Consolidation loans.

(1) For a Consolidation loan, the repayment period begins on the day of disbursement, with the first payment due within 60 days after the date of disbursement.